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Supreme Court, U.S.
FILED

No. (1) 06-610

OCT 31 2006

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In The

Supreme Court of the United States

JAMAL MOORANI,

Petitioner,

v.

ALBERTO GONZALES, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner was rendered statutorily ineligible for adjustment of status to lawful permanent resident because he did not depart the United States voluntarily pursuant to an order of the Board of Immigration Appeals ("BIA") that was subsequently reopened and remanded to the Immigration Judge to consider his application for adjustment of status.

2. Alternatively, whether the period of voluntary departure granted by the BIA was tolled by the timely filing of Petitioner's motion to reopen his removal to seek newly available relief in the form of adjustment of status.

3. Whether the Court of Appeals improperly affirmed the denial of Petitioner's adjustment of status on grounds that were never articulated by the Immigration Judge or the Board of Immigration Appeals, contrary to this Court's decisions in *INS v. Ventura* and *SEC v. Chenery*.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's petition for review is unreported. *Moorani v. Gonzales,* No. 04-60971 (5th Cir. May 26, 2006). App. 1.

The decision of a single member of the Board of Immigration Appeals, affirming without opinion the decision of the Immigration Judge on remand denying Petitioner's application for adjustment of status to lawful permanent resident pursuant to §245 of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1255, is unreported. *Matter of Moorani,* File A73 111 72 (BIA October 5, 2004). App. 6.

The decision of the Immigration Judge, denying Petitioner's application for adjustment of status following remand from the Board of Immigration Appeals to consider that relief, is unreported. *Matter of Moorani,* File A73 111 729 (United States Immigration Court. Houston, Texas, August 20, 2003). App. 7.

The decision of the Board of Immigration Appeals granting Petitioner's motion to reopen his removal proceedings for the purpose of applying for newly available relief in the form of adjustment of status, and remanding the case to the Immigration Judge for consideration of such relief, is unreported. *Matter of Moorani,* File A73 111 729 (BIA October 8, 2002). App. 9.

The original decision of the Board of Immigration Appeals, dismissing Petitioner's appeal from the Immigration Judge's order denying his application for asylum, is

unreported. *Matter of Moorani,* File A73 111 729 (BIA April 8, 2002). App. 11.

The initial decision on the Immigration Judge finding Petitioner deportable and ineligible for asylum is unreported. *Matter of Moorani,* File A73 111 729 (United States Immigration Court, Houston, Texas, August 8, 2000). App. 13.

The decision of the United States Court of Appeals for the Fifth Circuit denying Petitioner's Petition for Rehearing *En Banc* is unreported. *Moorani v. Gonzales,* No. 04-60971 (5th Cir. August 2, 2006). App. 25.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on May 26, 2006, and denied rehearing on August 2, 2006. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. §1254(1). While Petitioner's case involves an application for relief from removal, review is not barred by 8 U.S.C. §1252(a)(2)(B) because the questions presented herein are "questions of law raised upon a petition for review." 8 U.S.C. §1252(a)(2)(D).

APPLICABLE LAW

INA §245(a), 8 U.S.C. §1255(a), which provides: "Status as person admitted for permanent residence on application and eligibility for immigrant visa. The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien

having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to the status of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed."

INA §240(c)(7)(A), 8 U.S.C. §1229a(c)(7)(A), which provides: "In general. An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv)."

INA §240(c)(7)(C)(i), 8 U.S.C. §1229a(c)(7)(C)(i), which provides: "In general. Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal."

INA §240B(b)(1), 8 U.S.C. §1229c(b)(1), which provides: "In general. The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 240 [8 U.S.C. §1229a], the immigration judge enters an order granting voluntary departure in lieu of removal and finds that – (A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 239(a) [8 U.S.C. § 1229(a)]; (B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding

the alien's application for voluntary departure; (C) the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4) [8 U.S.C. § 1227(a)(2)(A)(iii) or § 1227(a)(4)]; and (D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so."

INA §240B(b)(2), 8 U.S.C. §1229c(b)(2), which provides: "Period. Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days."

INA §240B(d)(1), 8 U.S.C. §1229c(d)(1), which provides: "In general. Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien – (A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and (B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 240A, 245, 248, and 249" [8 U.S.C. §§ 1229b, 1255, 1258, and 1259].

8 CFR §1245.2(a)(1)(i), which provides: "In General. In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file."

8 CFR §1003.2(c)(1), which provides: "A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied

by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation."

8 CFR §1003.2(c)(2), which provides: "Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after

the date on which the final administrative decision was rendered in the proceeding sought to be reopened."

8 CFR §1003.2(d), which provides: "Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."

8 CFR §1240.26(f), which provides: "Extension of time to depart. Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act."

STATEMENT OF THE CASE

This case involves the interplay between two sections of the Immigration and Nationality Act, one permitting a

motion to reopen removal proceedings to seek newly available relief from removal if filed within 90 days of the final removal order, and another that bars certain relief applications for ten years where the alien fails to timely depart the United States after having been granted the privilege of voluntary departure. Petitioner Jamal Moorani sought reopening of his removal to seek adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. §1255. His motion was granted by the BIA but, on remand, the Immigration Judge held that his adjustment of status was precluded by his failure to depart during the voluntary departure granted by the reopened BIA decision. On administrative appeal, the BIA affirmed without opinion and the Court of Appeals denied Mr. Moorani's petition for review.

The Court of Appeals held that the BIA had no jurisdiction to reopen the removal proceedings after the expiration of Petitioner's voluntary departure. Two other Circuits have held, however, that reopening a removal order has the effect of vacating that order. Indeed, the Seventh Circuit has specifically held that a failure to depart during a voluntary departure order that was subsequently reopened cannot be asserted to bar the new relief because there was no longer a voluntary de rture order with which the alien could fail to comply.

Further, the majority of United States Courts of Appeals that have considered the issue have held that the timely filing of a motion to reopen before the expiration of a voluntary departure period tolls the voluntary departure while the motion is under consideration, such that the relief application underlying the motion to reopen remains viable. The Fifth Circuit's decision in Petitioner's case therefore creates a split between the Circuits on both

questions, with the Fifth Circuit standing alone in its interpretation of the applicable statutes and regulations.

A. Jurisdiction of the Court of Appeals.

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA §242(a)(1), 8 U.S.C. §1252(a)(1), which provides for judicial review of a final order of removal.

B. Facts.

Petitioner Jamal Moorani first entered the United States on or about November 1, 1990, near New York, New York, without being admitted or paroled after inspection by an Immigration Officer. He is a member of the Shi'a Ismaili faith, a sect of Islam. Ismailis are a small minority in Pakistan, the vast majority of whose citizens are Sunni Muslims. After applying for asylum based upon a fear of religious persecution in Pakistan, Petitioner was placed in removal proceedings.

Mr. Moorani is unmarried. He has no criminal convictions. During the removal proceedings, Mr. Moorani was sponsored for lawful immigration by an employer willing to undertake the lengthy and complicated employment-based immigration process on his behalf. Eventually, an immigrant visa petition was approved by INS, making available to the Petitioner and alternative form of relief from removal through adjustment of status. Petitioner's attempt to reopen his removal proceedings to enable consideration of his adjustment of status forms the basis of the controversy herein.

C. Procedural History.

The Immigration Judge denied asylum in August 2000, but granted Petitioner a period of 60 days voluntary departure. App. 23. An appeal was taken to the BIA. The appeal of the asylum denial was dismissed by the Board on April 8, 2002. App. 11. In accordance with established BIA procedure, the Board's order of di missal extended for 30 days the voluntary departure period originally granted by the Immigration Judge. App. 12.

By the time of the Board's decision, however, Mr. Moorani had an immigrant visa petition filed on his behalf by a prospective employer and approved by the Immigration and Naturalization Service ("INS"). He had therefore become eligible to seek adjustment of status to lawful permanent resident pursuant to INA §245, 8 U.S.C. §1255. Petitioner filed a motion to reopen his removal proceedings before the expiration of the 30 day voluntary departure extension, and well within the 90 days allowed for such motions by statute and regulation. Over the objection of the INS, the BIA granted Mr. Moorani's motion to reopen and remanded the proceedings to the Immigration Judge for consideration of Mr. Moorani's application for adjustment of status. App. 9. The decision reopening the proceedings was issued on October 8, 2002, more than 30 days after the initial BIA decision dismissing Petitioner's asylum appeal.

1. Hearing on Remand.

On remand to the Immigration Judge, it was stipulated that Petitioner was eligible for and deserving of the requested adjustment of status but for the question of his failure to depart during the 30 day grant of voluntary

Missing Pages 10-25

As helpful as the Immigration Judge might find such attempts by federal appellate judges to rationalize her otherwise unexplained decision, that is not what the federal courts are expected to do. By affirming the denial of Petitioner's adjustment of status on grounds that were never articulated by the Immigration Judge or the BIA, the Court of Appeals committed error by disregarding the above decisions of this Court.

CONCLUSION

For the reasons shown, Petitioner urges that he was legally eligible for adjustment of status to lawful permanent resident notwithstanding that a period of voluntary departure granted in an order later reopened expired before his application could be considered. Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

QUAN BURDETTE & PEREZ, P.C.

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182 Fed.Appx. 352

In the
United States Court of Appeals
for the Fifth Circuit

No. 04-60971

JAMAL MOORANI,

Petitioner,

VERSUS

ALBERTO R. GONZALES,
UNITED STATES ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
No. A73 111 729

(Filed May 26, 2006)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Jamal Moorani petitions for review of the decision of the Board of Immigration Appeals ("BIA") finding him statutorily ineligible for adjustment of status. We affirm

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

based on *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006).

Moorani is a native and citizen of Pakistan who entered the country illegally on or around November 1, 1990. The Attorney General initiated removal proceedings on October 31, 1997. Moorani conceded removability but requested asylum and withholding of removal and in the alternative, voluntary departure. After a hearing on the merits, the immigration judge ("IJ") denied asylum but on August 20, 2000, granted voluntary departure, requiring Moorani to leave the country within sixty days[1] or forfeit certain forms of discretionary relief from removal, including adjustment of status.[2]

Moorani appealed, which automatically tolled the running of the voluntary departure period.[3] While his appeal was pending, Miraj Wholesale ("Miraj") in Houston offered Moorani full-time employment. Miraj filed an Immigrant Petition for Alien Worker, which was approved on February 4, 2002.

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[1] Permission to depart the United States voluntarily at the conclusion of removal proceedings "shall not be valid for a period exceeding 60 days." 8 U.S.C. § 1229c(b)(2).

[2] The voluntary departure statute provides civil penalties, including "ineligib[ility] for a period of 10 years for any further relief" from removal under, *inter alia*, 8 U.S.C. § 1229b, which governs adjustment of status, for aliens who fail to leave the United States within the time specified. 8 U.S.C. § 1229c(d).

[3] *See Matter of Villegas Aguirre*, 13 I.&N. Dec. 139, 140 (BIA 1969) (holding that a timely appeal "tolls the running of the voluntary departure authorization."); *Matter of Chouliaris*, 16 I.&N. Dec. 168, 170 (BIA 1977) (affirming *Aguirre* to the extent that a "grant of voluntary departure made by an immigration judge shall not be jeopardized by taking an appeal").

The BIA dismissed the appeal on April 8, 2002, and granted Moorani thirty additional days' departure time.[4] On May 8, the final day of the departure period, Moorani filed a motion with the BIA to reopen removal proceedings and remand to the IJ to apply for adjustment of status, based on the approved petition.[5] The Attorney General argued that the motion should be denied because Moorani had overstayed the reinstated departure period and was therefore ineligible for adjustment. On October 8, the BIA granted the motion. Although noting the Attorney General's argument, the BIA stated that "the ... district director, under some circumstances, may grant a *nunc pro tunc* extension of voluntary departure, which has the effect of not only extending an alien's voluntary departure time but also restoring voluntary departure to the date on which it expired."

On remand, the IJ permitted Moorani to file for an extension, but on August 19 the district director denied the request.[6] The IJ then issued a brief oral opinion

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[4] *See Chouliaris*, 16 I.&N. Dec. at 170 (modifying *Aguirre* to hold that where the IJ initially granted more than 30 days' departure time and that period has expired, "the respondent will be given 30 days from the date of our decision in which to depart voluntarily").

[5] An alien ordinarily "may file one motion to reopen [removal] proceedings[.]" 8 U.S.C. § 1229a(c)(7)(A). "The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material." *Id.* § 1229a(c)(7)(B). "[T]he motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." *Id.* § 1229a(c)(7)(C)(i).

[6] Because the district director ultimately denied Moorani's request, we need not decide whether he would in fact have the authority to issue the extension contemplated by the BIA. *Compare* 8 C.F.R. § 1240.26(f) ("Authority to extend the time within which to depart voluntarily specified initially by an [IJ] or the [BIA] is only within the jurisdiction

(Continued on following page)

stating that the IJ lacked jurisdiction over Moorani's application for adjustment of status because Moorani had failed to comply with the voluntary departure order. The BIA affirmed without written opinion; therefore, the IJ's opinion becomes the basis for this court's review. *Soadjede v. Ashcroft*, 324 F.3d 830, 831-32 (5th Cir. 2003).

Moorani argues that the IJ erred because (1) his motion to reopen on May 8 effectively tolled the voluntary departure period pending decision by the BIA, and (2) the BIA's grant of his motion and remand to the IJ vacated the underlying voluntary departure order, erasing the requirement that Moorani leave the country by a certain date or be subject to civil penalties.[7] The Attorney General argues that both tolling and vacatur would undermine the statutory scheme, which sets strict conditions (including a sixty-day limit) on aliens who have been granted the privilege of voluntary departure.

In *Banda-Ortiz*, 445 F.3d at 391, we declined to read into the voluntary departure statute "the requirement that

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of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs.") *and Banda-Ortiz*, 445 F.3d at 388 n.2 ("Although [petitioner] filed his motion ... two days after his voluntary departure period expired, the INS granted a two-day *nunc pro tunc* extension, thereby rendering the motion timely.") *with* 8 C.F.R. § 1240.26(f) ("In no event can the total period of time, including any extension, exceed ... 60 days.").

[7] The IJ's opinion does not specify whether Moorani is ineligible for relief because one or both of these arguments are in error. It states, however, that "the respondent is not eligible for any form of relief for ten years from the May 2, 2002 [sic] deadline of the BIA's April 8, 2002 ruling." Therefore, we may assume, as the basis for our review, that the IJ considered the BIA to be without power to grant Moorani's motion on October 8 once his request for *nunc pro tunc* extension was denied.

the BIA automatically toll an alien's voluntary departure period during the pendency of a motion to reopen." *Banda-Ortiz* disposes of Moorani's first argument. Because tolling was unavailable, Moorani became ineligible for any further relief from removal after his voluntary departure period expired on May 8. *A fortiori*, we need not consider whether the BIA's decision *to* grant his motion vacated the underlying departure order and allowed Moorani to pursue his motion on the merits before the IJ. Under *Banda-Ortiz*, the grant of the motion itself was untimely, and the agency lacked any further jurisdiction over Moorani's case.

The petition for review is DENIED.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73-111-729 – Houston Date: Oct 05, 2004

In re: MOORANI, JAMAL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Bates, Brian K., Esquire

ON BEHALF OF DHS:
Rory H. Potter, Assistant Chief Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/ Frederick D. Hess
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Houston, Texas

File No.: A 73 111 729

In the Matter of	)	
JAMAL MOORANI	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE:

APPLICATIONS: Adjustment of status.[1]

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Brian K. Bates, Esquire	Dean Emmons, Esquire Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is before this Court on a granted motion to reopen. The respondent moved to reopen his case before the Board of Immigration Appeals to apply for adjustment of status with the Court. The Board granted the motion to reopen and remanded the case for further proceedings and noted that the record included a notice of approval for a visa petition filed for the respondent as a skilled worker by an employer, which was approved February 2, 2002. The respondent in this

[1] The Court does not have jurisdiction to proceed on adjustment of status in this case as the respondent had been granted voluntary departure and the respondent is not eligible for any form of relief for ten years from the May 2, 2002 deadline of the BIA's April 8, 2002 ruling.

case did not comply with a voluntary departure order and the attorney for the respondent was granted the opportunity to request that the Government grant an extension *nunc pro nunc* [sic] that is now (indiscernible). However, the Government has denied the *nunc pro tunc* request thereby making the respondent ineligible for relief for ten years. The Court does not have jurisdiction to proceed on the respondent's application for adjustment of status. The Board implied that it thought perhaps the Government might grant the *nunc pro tunc* request, but it has not. Thus, the Court has no jurisdiction to entertain the application for any form of relief in this particular case. Thus, the following order shall be entered.

ORDER

IT IS ORDERED that the respondent be removed from the United States to his native country of Pakistan pursuant to the previous order.

CLAREASE RANKIN-YATES
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73-111-729 – Houston Date: Oct 08, 2002

In re: JAMAL MOORANI

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro Se[1]

ON BEHALF OF SERVICE: Rory H. Potter
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] –
Present without being admitted or paroled

APPLICATION: Reopening

Now before the Board of Immigration Appeals is the respondent's motion to reopen timely filed on May 8, 2002. The motion to reopen will be granted, and the record will be remanded.

The respondent has moved to reopen in order to apply for adjustment of status with the Immigration Judge. We

[1] As a courtesy, we are sending a copy of this opinion to Brian K. Bates, Esquire, 5177 Richmond Avenue, Suite 800, Houston, Texas 77056-6736. The file does not contain a Form EOIR-27 Notice of Entry of Appearance As Attorney or Representative Before the Board of Immigration Appeals from attorney Bates, in conjunction with the current motion.

will grant the motion to reopen and will remand the case for further proceedings.[2]

A73 111 729

ORDER: The motion to reopen is granted, and the record is remanded to the Immigration Court for further proceedings consistent with this opinion.

/s/ Gustavus Villageliu
FOR THE BOARD

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[2] The record includes the notice of approval for the visa petition filed for the respondent as a skilled worker by an employer, which petition was approved on February 4, 2002, with a priority date of October 11, 2000. The latest available information reflects that relevant third preference visas are current for Pakistan, so that a visa is immediately available to the respondent. *See* United States Department of State Visa Bulletin, Vol. VIII, No. 50 (October 2002). Upon remand, all necessary documents, including the completed Form I-485 adjustment application and the visa petition approval notice, are to be filed with the Immigration Court, along with proof of payment of the requisite filing fees to the Immigration and Naturalization Service. *See* section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i); 8 C.F.R. § 245.2(a)(3)(iii) (2002). Both the respondent and the Service will have the opportunity to present any and all available evidence relevant to the respondent's statutory and discretionary eligibility for adjustment of status. The Service suggests that the respondent may be ineligible for adjustment due to his failure to voluntarily depart within the scheduled period as reinstated in our earlier order, pursuant to section 240B of the Act, 8 U.S.C. § 1250b, and *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), *aff'd, Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998). However, the Service's district director, under some circumstances, may grant a *nunc pro tunc* extension of voluntary departure, which has the effect of not only extending an alien's voluntary departure time but also restoring voluntary departure to the date on which it expired.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73-111-729 – Houston Date: Apr 08, 2002

In re: MOORANI, JAMAL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Bates, Brian K., Esquire

ORDER:

PER CURIAM. The appeal is dismissed. The appellant checked Box 6 on the Notice of Appeal (Form EOIR-26) indicating that a separate written brief or statement would be filed in addition to the reasons for appeal accompanying the Notice of Appeal. Block 6 is immediately followed by a clear warning that the appeal may be subject to summary dismissal if the appellant indicates that such a brief or statement will be filed and, "within the time set for filing, you fail to file the brief or statement and do not reasonably explain such failure." The appellant was granted the opportunity to submit a brief or statement in support of the appeal. However, the record indicates that appellant did "not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing." 8 C.F.R. § 3.1(d)(2)(i)(D). Moreover, upon review of the record, we are not persuaded that the Immigration Judge's ultimate resolution of this case was in error. Accordingly, we find that summary dismissal is appropriate pursuant to the provisions of 8 C.F.R. § 3.1(d)(2)(i)(D).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ John Guendelsberger
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Houston, Texas

File No.: A 73 111 729 August 8, 2000

In the Matter of	)	
JAMAL MOORANI	)	IN REMOVAL PROCEEDINGS
Respondent	)	

NTA CHARGE: Section 212(a)(6)(A)(i) (present without admission or parole).

APPLICATIONS: Section 208(a) (asylum), Section 241(b)(3) (withholding of removal), Section 240B(b) (voluntary departure).

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Brian K. Bates, Esquire Gordon Kwan and Associates 5177 Richmond Avenue, Suite 800 Houston, Texas 77056-6736	Rory Potter, Esquire Assistant District Counsel Houston, Texas

ORAL DECISION AND ORDER
OF THE IMMIGRATION JUDGE

The instant record relates to a male alien native and citizen of Pakistan who was placed into removal proceedings pursuant to the issuance of a Notice to Appear dated October 29, 1997. *See* Exhibit 1. The Service charges that the respondent is subject to removability as an alien who is present in the United States without being admitted or paroled. Specifically, the Government alleges that the respondent is not a citizen or national of the United

States, that he is a native and citizen of Pakistan, and that he entered the United States at or near New York, New York, on or about November 1, 1990, and that at that time he was not admitted or paroled after inspection by an Immigration Officer. *See id.* The respondent, represented by counsel, admitted the truth of the four factual allegations contained in the Notice to Appear and conceded that in fact he was subject to removal on the charge set forth therein. Based on the admissions and concessions of the respondent, through counsel, I do find that his removability has been established by evidence the clear and convincing standard in the record.

The respondent declined to designate a country of removal and instead desired to proceed with an application for asylum. The respondent evidently had filed an application for asylum with the Service on or about 1994. That application is in the record as Exhibit 2. The respondent was given the opportunity to supplement that application. Such supplement is in the record as Exhibit 3. In addition, there are documentary evidence that have been submitted on behalf of the respondent and in support of his application for asylum, specifically, Group Exhibit 4 and 5. The respondent, in order to be eligible for asylum, must establish that he meets the definition of a refugee as that term is found in the Immigration and Nationality Act. Specifically, a refugee is a person who is outside one's country of nationality or citizenship and who is unable or unwilling to return to such country of nativity or citizenship due to a well-founded fear of persecution based on his race, religion, nationality, membership in a particular social group, or political opinion. The respondent's fear to asylum or alleged fear in this case is based on his religion. Specifically, the respondent is a member of the Shiite

Muslim community in Pakistan, specifically, a particular sect known as the Ismaili sect. The Ismaili sect, according to the respondent's testimony, is different from the regular Sunni Muslims and other Shiite Muslims in that the Ismaili sect allows women to participate in prayer and worship in the Ismaili mosque. This evidently is contrary to the other factions of the Muslim faith.

The respondent submitted his testimony in support of his application for asylum. The respondent did testify that he was born in Pakistan in 1969, and he was approximately 20 years of age at the time that he came to the United States. He had worked in his father's business in Pakistan, which was in a clothing cleaning business, as well as going to school. The respondent's brother is present in the United States and is currently a United States citizen. The respondent expects his father to arrive in the United States within the near future as an immigrant based on a petition submitted by the respondent's brother. The respondent stated that his entire family is of the Ismaili faith. The respondent's brother returned to Pakistan sometime last year in order to be with the respondent's father when he was ill and hospitalized. The respondent stated that this is due to his father's advanced age.

Regarding his religion, the respondent stated that he was active in the Ismaili religion. Specifically, he states that he was involved as a guard or one that would help the ladies into the mosque for prayer. The respondent testified that approximately 10 to 15 times during his service as a security individual that he was harassed by Sunni Muslims to the point that fights would erupt. He testified that on six to seven occasions he actually was physically injured. He indicated that he had been hospitalized on

several occasions and one time for a period of a week. He also testified that on one occasion a friend was standing next to the respondent during the period of time that he was conducting the security activities and that Sunni Muslims harassed him and his friend, that a fight erupted and that the respondent's friend was actually shot during the incident. The respondent testified that he was not shot nor hurt but that his friend was killed or died due to this shooting incident. When questioned concerning the date, the respondent's closest time frame was between 1988 or 1989. The respondent also claims that his cousin was shot. He states that his cousin evidently was shot due to his activities as a security guard on the street. The respondent stated that the reason that he was able to get the cousin's medical documentation was that the cousin was severely injured.

The respondent testified concerning the arrest that was referenced in his application for asylum. Specifically, the respondent was arrested due to an altercation between MQM and PPP party individuals, a fight erupted. The respondent was next to his friends who were MQM members and that the police came and arrested various individuals, one of which was the respondent. The respondent testified that he was not a member of any political party and that he was not claiming persecution due to any political activities in his home country.

On cross-examination, it was brought out that the respondent took a period of over three years in order to file his application for asylum. The respondent indicated that this was due to his lack of knowledge of asylum laws due to him coming from a third world country. The respondent testified that his family, specifically his father and stepfather, still reside in the family home in Karachi where the

respondent was a resident prior to his coming to the United States. The respondent testified about his educational background, specifically that he had gone to public school in Pakistan as well as attended a private school and college. He did indicate that he did not attend the university but that he did attend a school called the Pakistan Academy, which is a private school, for approximately three to four years. Concerning the lack of medical documentation submitted for the respondent's alleged injuries, he stated that in Pakistan medical records are not kept and that it is a third world country. He also indicated that the hospital had moved and that there are no computers in that country. The respondent stated that he did send his father to get these medical records. There were no medical records submitted on behalf of the respondent concerning his alleged hospitalization. The first issue to be determined in any asylum or withholding of removal. To qualify for asylum case where the respondent is the only testifying witness is his credibility. In this case, I find that the respondent is not a wholly credible witness for various reasons. Firstly, the respondent made testimonial claims to 10 to 15 fights, including six to seven times when he claims he was physically injured. He did state that he was hospitalized for a period of one week. The testimony of the respondent would appear to claim more hospitalizations than the one but did reference or emphasize the one week hospitalization. It is noteworthy that not one mention of any of the altercations nor hospitalizations were made in the respondent's initial application for asylum, only the supplemental application would tend to reference the altercations or fights. The respondent's claims that there are no records of his medical treatment presented based on Pakistan being a third world country and that there are no computers nor hospitalization records and that the

hospital has moved, I do not find to have the ring of truth. In fact, the respondent's documentary evidence does contain medical records of his cousin. The respondent, if in fact he was hospitalized for the significant period of time that he claims, would have in all reasonable likelihood been able to obtain such documentary evidence of record. The documents submitted on behalf of the respondent's cousin are fairly complete and specific indicating injuries and type of treatment. It is reasonable to assume that if the respondent was in fact hospitalized as claimed that there would have been such records for his hospitalization. The respondent, in addition to his testimony, was not specific concerning any of the injuries that he claims to have had. Any injury that was inflicted upon the respondent that would have landed him in the hospital for a period of a week would have been a sufficiently severe injury that there should have been some kind of documentation available for such an injury. The respondent did specifically testify about his little finger being broken. However, this injury was in reference between the MQM and the PPP altercation where the respondent was arrested. The respondent's only statement concerning a specific injury was referencing this altercation when the respondent was arrested. As the respondent stated, it was not related to any religious activity. The respondent did not give any testimony nor any evidence concerning even an estimated close date of the hospitalization. Such a traumatic experience would have been much more detailed if it fact it would have occurred. For this reason I do find that the aspect of the respondent's alleged hospitalization to be strained as far as credibility.

Another aspect of the respondent's case that is fairly significant that leave the respondent somewhat lacking in

credibility is the alleged shooting incident. Specifically, the respondent claimed that he was standing next to a co-worker friend when they were on duty as security at his mosque. The respondent indicated that the respondent and his friend became involved in an altercation between the Sunni extremists. The respondent then claimed that as a result of this fight between these extremists, that shots were fired and that respondent's friend was mortally wounded. The respondent could not even give a year when this supposed incident happened. It was sometime in 1988 or 1989. This Court finds it incredible that such a traumatic incident where one's life is in jeopardy would have been a significant incident in an individual's life and that the respondent's inability to give a specific time of such incident is not credible. In addition, this incident is remarkably left out of both of the respondent's applications at Exhibit 2 and Exhibit 3 of the supplement. It is, as stated, not credible that such an event would have been overlooked by the respondent in filling out his application for asylum. It would appear that the respondent's testimony today would be an embellishment upon the true facts in order to support his claim for asylum in the United States. In looking at this it appears that the respondent taking over three years to apply for asylum in the United States is not consistent with an individual that truly fears for his life if returned to his home country. It would be more plausible that an individual that fears, as the respondent claims to fear, would have sought the benefit and aid of the United States Government fairly contemporaneous with his arrival but definitely not a period of over three years after arrival. I do not find it plausible that the respondent's claims that coming from a third world country he was not versed and such prevented him from submitting his application for asylum. It would appear

that the respondent, in fact, is a fairly educated individual and was so upon his arrival in the United States, sufficiently educated and world wise that he was able to obtain a photo switched passport and enter the United States at New York. Therefore, I do find that the respondent is not a wholly credible witness referencing his claim.

Even looking at the claim of fear of persecution and looking at the well-founded fear standard, none of the claims that the respondent makes on his first application for asylum of torture, cruelty, or persecution, or being threatened with death were supported by any testimony. Specifically, statements on the first application for asylum do not coincide with the State Department materials. The respondent's application would tend to indicate a systematic nationwide persecution of the Shiites from the Sunni Sect. The Ismaili sect is in fact a part of the Shiite sect according to the State Department materials. It would appear that there is ample evidence that in fact the Sunni and Shiite sects of the Muslim faith have at various times been contrary to each other, even to shootings and killings. However, it would not appear that it is as systematic as the respondent would claim as the State Department materials would indicate the country being over 100 million individuals does, and where persons take their religion fairly seriously, does lend itself to violence between these various groups. The materials do indicate that there is violence, specifically between Sunni and Shiite groups. However, it also indicated the State Department materials, Exhibit 6, page 9, would indicate that Shiites are not systematically discriminated against by the other elements in the Pakistani society as opposed to other Shiite individuals in the other Arab countries. The respondent's family situation would indicate that in fact the

State Department materials at Exhibit 6 are in fact accurate. The respondent's family is very well to do in their home country, owning their home, several businesses. In addition, contrary to believing that the respondent would suffer a systematic nature of persecution if he were returned, is the fact that his brother, who is in fact an Ismaili Muslim, returned to Pakistan just last year to visit his father. If in fact the family would be systematically harmed as he states, it is reasonable to believe that the brother would not have returned to Pakistan. The respondent's fear of harm would apparently be the result of societal religious unrest in his home country. A well-founded fear of persecution has been addressed by the Supreme Court at being somewhat in the ten percent nature. The respondent, specifically, cannot show that he in fact has a well-founded fear of persecution based on his religion if he were returned to Pakistan, approximately 20% of the population is in fact Shiite Muslim. His being an Ismaili is a smaller portion of the Shiite sect. It is interesting to note that in the State Department materials no specific references are generally made to the Ismaili sect of the Shiite Muslims. There are some aspects or some mention made of the Ismaili sect, however, none that would indicate any special attention from the Sunnis as far as being a member of the Shiite sect and Ismaili. The only reference that the Court was able to find was at Exhibit 5, page 56, where apparently in 1999 there was a Sunni religious leader who was killed along with his nephew at the hands allegedly of one Ismaili. The Sunni religious parties evidently requesting that the Aga Khan foundation, which is considered or stated in this document to be a community service organization sponsored by Ismaili Shiites, the Sunni religious parties asked that that be closed. Evidently, this is an isolated incident where the

Sunni religious party leader was killed based on a property dispute. This incident happened in August 19, 1999. The implication, even assuming all the facts as stated as true, would appear to be that the respondent at most would have apprehension due to the religious unrest in his home country. Accordingly, I find that the application for political asylum, accepting the facts as presented, would still not establish that the respondent has a well-founded fear of persecution based on his being a member of the Shiite Muslim sect (Ismaili faction). Therefore, I do find that the respondent's application for asylum must be denied.

The application for asylum is also to be considered an application for withholding of removal. The burden of referencing an application for withholding of removal is of course much greater than that of asylum. In other words, it must be shown that it is more likely than not that the respondent would be persecuted if returned to Pakistan. Since the lower burden referencing asylum has not been met, I find that the application for withholding of removal must also be denied.

The respondent has requested voluntary departure from the United States. I, in finding him incredible, do not make a finding that he has given false testimony. I find that he is in fact eligible for voluntary departure. His ties to the United States, specifically a ten year sojourn in this country as well as a United States citizen brother, would in fact indicate that the respondent should merit voluntary departure from this country. In actuality, it is quite possible the respondent, in the future, may well be the beneficiary of possible immigration to this country due to his father's close immigration as well as his United States citizen brother. Therefore, the Court does not feel that

removal from the United States would be in the interest of the United States nor the respondent. And accordingly, voluntary departure will be granted. The Court will grant the respondent the maximum amount of voluntary departure in that he has evidently a substantial amount of ties and equities to this country. And accordingly, the following orders will be entered:

ORDERS

IT IS HEREBY ORDERED that the respondent's application for asylum will be and the same is hereby denied.

IT IS FURTHER ORDERED that respondent's application for withholding of removal be and the same is hereby denied.

IT IS FURTHER ORDERED that the respondent be granted voluntary departure from the United States on or before October 6, 2000.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure be conditioned upon his posting a bond in the amount of $500 to be posted on or before August 15, 2000.

IT IS FURTHER ORDERED that should the respondent fail or refuse to depart voluntarily when and as required or fail or refuse to post the voluntary departure bond when and as required, that the voluntary departure will be withdrawn automatically and that the following order would take immediate effect.

IT IS ORDERED that the respondent be removed from the United States to Pakistan on the charge contained in the Notice to Appear.

HOWARD VAN WINKLE
Immigration Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60971

JAMAL MOORANI

Petitioner

v.

ALBERTO R. GONZALES, U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appels

ON PETITION FOR REHEARING EN BANC

(Opinion 05/26/06, 5 Cir., ___, ___ F.3d ___)

(Filed Aug. 2, 2006)

Before KING, SMITH and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehering is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Jerry Smith
United States Circuit Judge

Supreme Court, U.S.
FILED
FEB 23 2007
OFFICE OF THE CLERK

(2)

No. 06-610

In the Supreme Court of the United States

JAMAL MOORANI, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the grant of a motion to reopen removal proceedings necessarily vacated the requirement in an underlying order granting voluntary departure that the alien depart the United States by a specified date.

2. Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure.

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In the Supreme Court of the United States

No. 06-610

JAMAL MOORANI, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is available at 182 Fed. Appx. 352. The order of the Board of Immigration Appeals (Pet. App. 6) and the decision of the immigration judge (Pet. App. 7-8) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2006. A petition for rehearing was denied on August 2, 2006 (Pet. App. 25-26). The petition for a writ of certiorari was filed on October 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that, as an alternative to

formal removal proceedings and entry of a formal removal order, "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense." 8 U.S.C. 1229c(a)(1) and (b)(1). Voluntary departure may be granted before the initiation of removal proceedings or during the course of such proceedings, 8 U.S.C. 1229c(a)(1), and also may be granted at the close of removal proceedings in lieu of ordering that the alien be removed, 8 U.S.C. 1229c(b)(1). Aliens who receive voluntary departure avoid the five to ten-year period of inadmissibility that would result from an order of removal. See 8 U.S.C. 1182(a)(9)(A). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006) (quoting *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004)). To qualify for a grant of voluntary departure at the close of removal proceedings, an alien must satisfy certain statutory conditions, including establishing that he "has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1)(D); see 8 U.S.C. 1229c(b)(1)(A)-(C).

Because the Act provides that the Attorney General "may" permit an alien to depart voluntarily, the determination whether to allow an alien to do so is discretionary with the Attorney General, and with the immigration judge (IJ) and Board of Immigration Appeals (BIA) who act on his behalf. And the Act further provides that "[t]he Attorney General may by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens." 8 U.S.C. 1229c(e).

The Act prescribes that, when an alien is granted voluntary departure at the close of removal proceedings, "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2).[1] An IJ who grants voluntary departure must "also enter an alternate order [of] removal," which takes effect if the alien fails to depart within the period specified in the voluntary departure order. 8 C.F.R. 1240.26(d); see 8 C.F.R. 1241.1(f). After entry of a final order, authority to extend a period of voluntary departure specified initially by an IJ or the BIA is vested in the district director or other officers of Immigration and Customs Enforcement (ICE) in the Department of Homeland Security, see 8 C.F.R. 1240.26(f), subject to the statutory maximum of 60 days in the case of voluntary departure granted at the conclusion of proceedings. Failure "to depart the United States within the time period specified" results, *inter alia*, in the alien's becoming "ineligible for a period of 10 years," to receive certain forms of discretionary relief, including cancellation of removal, adjustment of status, and a subsequent grant of voluntary departure. 8 U.S.C. 1229c(d)(1)(B) (as amended by Pub. L. No. 109-162, Tit. VIII, § 812, 119 Stat. 3057); see 8 C.F.R. 1240.26(a).

b. The INA provides that an alien who has been found removable from the United States "may file one motion to reopen [the removal] proceedings" to present "new facts." 8 U.S.C. 1229a(c)(6)(A)-(B). The statute prescribes that "the motion to reopen shall be filed within 90 days of the date of entry of a final administra-

[1] When voluntary departure is granted before the initiation or in the course of removal proceedings, rather than at the close of such proceedings, the alien may be allowed a maximum of 120 days to depart voluntarily. 8 U.S.C. 1229c(a)(2)(A).

tive order of removal." 8 U.S.C. 1229a(c)(6)(C)(i). An alien who is the subject of removal proceedings and who departs the United States may not file a motion to reopen "subsequent to his or her departure." 8 C.F.R. 1003.2(d). In addition, if an alien who is the subject of removal proceedings departs the United States "after the filing of a motion to reopen," the alien's departure "constitute[s] a withdrawal of such motion." *Ibid.*

The regulations provide that, if removal proceedings are reopened, the IJ or the BIA may reinstate voluntary departure, but only "if reopening was granted prior to the expiration of the original period of voluntary departure." 8 C.F.R. 1240.26(f) and (h). Moreover, the "decision to grant or deny a motion to reopen * * * is within the discretion of the Board," and "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a). Finally, the filing of a motion to reopen "shall not stay the execution of any decision made in the case," and "[e]xecution of such decision shall proceed unless a stay of execution is specifically granted by" the BIA or the IJ. 8 C.F.R. 1003.2(f).

2. Petitioner is a native and citizen of Pakistan who illegally entered the United States without inspection in 1990. On October 31, 1997, the government initiated removal proceedings against petitioner, charging him with being removable as an alien present in the United States without being admitted or paroled. See 8 U.S.C. 1182(a)(6)(A)(i). Petitioner conceded that he was removable, but requested asylum and withholding of removal, or, in the alternative, voluntary departure. Pet. App. 2.

On August 8, 2000, the immigration judge (IJ) denied petitioner's request for asylum and withholding of removal, but granted his request for voluntary departure.

Pet. App. 13-24. The IJ's order gave petitioner a period of 60 days within which to effect his voluntary departure; included an alternate order of removal; and specified that, if petitioner failed "to depart voluntarily when and as required," the allowance of voluntary departure would "be withdrawn automatically and" the alternate removal order "would take immediate effect." *Id.* at 23-24.

Petitioner filed an administrative appeal to the BIA, which had the effect of rendering the IJ's order non-final and thus of tolling the voluntary departure period pending appeal. See 8 U.S.C. 1101(a)(47)(B) (order becomes "final" upon affirmance by BIA); 8 U.S.C. 1229c(b)(1) (allowing Attorney General to permit voluntary departure at the conclusion of a removal proceeding under 8 U.S.C. 1229a); 8 C.F.R. 1003.6(a), 1003.39; *In re Chouliaris*, 16 I. & N. Dec. 168, 169-170 (BIA 1997). On April 8, 2002, the BIA summarily dismissed petitioner's appeal. Pet. App. 11-12. The BIA's order specified that petitioner would be permitted to depart voluntarily within a period of 30 days from the date of the BIA's order "or any extension beyond that time as may be granted by the district director." *Id.* at 12; see 8 C.F.R. 1240.26(f). The BIA's order also gave notice that, if petitioner failed to depart "within the time period specified," petitioner would "be ineligible for a period of 10 years for any further relief under," *inter alia*, the statutory provisions governing adjustment of status. Pet. App. 12.

3. On February 4, 2002, while petitioner's administrative appeal was still pending before the BIA, an employment-based visa petition was approved on petitioner's behalf. Pet. App. 2. Petitioner, however, did not file a motion with the BIA to remand the proceedings to

the IJ to enable him to seek adjustment of status based on the approved visa petition, as the regulations allow. See 8 C.F.R. 1003.2(c)(4). And after the BIA issued its order dismissing petitioner's appeal, petitioner did not depart the United States within the 30-day voluntary departure period specified in the BIA's order. Instead, on May 8, 2002, the final day of the voluntary departure period, petitioner filed a motion with the BIA to reopen its decision in his removal proceedings and to remand the proceedings to the IJ to permit him to seek adjustment of status based on the approved visa petition. *Id.* at 3. Petitioner did not at the same time move for a stay of execution of the BIA's decision under 8 C.F.R. 1003.2(f) pending consideration of his motion to reopen. The government opposed the motion to reopen, arguing that petitioner was ineligible to receive adjustment of status because, by the time of the government's response, petitioner had overstayed the voluntary departure period. *Ibid.*

On October 8, 2002, the BIA granted the motion to reopen and remanded the case to the IJ for further proceedings. Pet. App. 9-10. The BIA specifically noted the government's argument that petitioner was ineligible for adjustment of status "due to his failure to voluntarily depart within the scheduled period as reinstated in our earlier order." *Id.* at 10 n.2. The BIA observed, however, that the "district director, under some circumstances, may grant a *nunc pro tunc* extension of voluntary departure, which has the effect of not only extending an alien's voluntary departure time but also restoring voluntary departure to the date on which it expired." *Ibid.*; see 8 C.F.R. 1240.26(f).

On remand, the IJ permitted petitioner to request an extension of the voluntary departure period from the

ICE district director, but on August 19, 2002, the district director denied the request. Pet. App. 3. The IJ then issued a decision denying petitioner's application for adjustment of status, holding that there was no jurisdiction to proceed on the application because petitioner's failure to depart within the voluntary departure period had rendered him ineligible to seek adjustment for a period of ten years. *Id.* at 7-8. On October 5, 2004, the BIA affirmed the IJ's decision without opinion. *Id.* at 6.

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-5. Petitioner argued that his filing of a motion to reopen had automatically stayed the voluntary departure period. In rejecting that argument, *id.* at 4-5, the court of appeals relied on its previous decision in *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), petition for cert. pending, No. 06-477 (filed Sept. 28, 2006), which held that the filing of a motion to reopen does not automatically toll the voluntary departure period. The court thus held in this case that petitioner "became ineligible for any further relief from removal after his voluntary departure period expired." Pet. App. 5.

Petitioner argued, in the alternative, that the BIA's grant of his motion to reopen necessarily had the effect of vacating the BIA's previous voluntary departure order, including the requirement that petitioner depart within 30 days of that order. Pet. App. 4. The court concluded that it "need not consider whether the BIA's decision to grant his motion vacated the underlying departure order and allowed [petitioner] to pursue his motion on the merits before the IJ." *Id.* at 5. The court explained that, under its previous decision in *Banda-Ortiz*, the BIA's "grant of the motion itself was untimely" because the voluntary departure period had expired, and

"the agency [thus] lacked any further jurisdiction over [petitioner's] case." *Ibid.*

ARGUMENT

1. Petitioner argues (Pet. 16-19) that the BIA's grant of his motion to reopen necessarily had the effect of vacating the voluntary departure period prescribed in the BIA's underlying order, and necessarily excused petitioner from the consequences of his failure to depart during that period. That contention lacks merit and does not warrant review.

When the BIA granted petitioner's motion to reopen his removal proceedings to permit him to apply for adjustment of status, the BIA specifically noted the government's argument that petitioner was ineligible for adjustment of status because he had overstayed the voluntary departure period set forth in the BIA's previous order. Pet. App. 10 n.2. The BIA did not reject the government's argument or suggest that it was lacking in merit.

To the contrary, the BIA assumed that petitioner would be ineligible for adjustment of status unless he received a *nunc pro tunc* extension of his voluntary departure period: the BIA's order, after noting the government's argument that petitioner was ineligible for adjustment of status, stated that the "district director, under some circumstances, may grant a *nunc pro tunc* extension of voluntary departure, which has the effect of not only extending an alien's voluntary departure time but also restoring voluntary departure to the date on which it expired." Pet. App. 10 n.2. Indeed, the BIA's previous order prescribed that petitioner would be subject to the ten-year ineligibility period if he "fail[ed] to depart the United States within the time period speci-

fied." *Id.* at 12. Especially in these circumstances, the BIA's grant of reopening did not have the effect of vacating the requirement in the BIA's previous order that petitioner depart within the voluntary departure period, as the BIA itself assumed that the voluntary departure period would control unless petitioner qualified for and received an extension from the district director.[2]

Contrary to petitioner's argument (Pet. 16-17), the decision below does not give rise to a conflict in the courts of appeals on whether, in the circumstances presented by this case, the BIA's grant of a motion to reopen necessarily vacates the voluntary departure period set forth in a prior order. First, the court of appeals' decision is unpublished and does not establish circuit precedent in the Fifth Circuit on any of the issues it addressed, including the consequences of the BIA's reopening. See Pet. App. 1 n.*.

Second, the court of appeals held that it need not address the issue of whether reopening necessarily vacated the voluntary departure period. The court reasoned that the BIA's grant of the motion to reopen to

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[2] By the time the BIA granted reopening, the 30-day voluntary departure period prescribed by the BIA's previous order had expired, and a period of more than the 60-day maximum authorized by the voluntary departure statute, see 8 U.S.C. 1229c(b)(2); 8 C.F.R. 1240.26(e)-(f), had elapsed. Although the district director has authority under the regulations to extend the voluntary departure period up to the statutory maximum, 8 C.F.R. 1240.26(e), the regulations make clear that, "[i]n no event can the total period of time, including any extension, exceed * * * 60 days as set forth in * * * the Act," 8 C.F.R. 1240.26(f). The court of appeals noted that there was a question whether the district director "in fact [had] the authority to issue the extension contemplated by the BIA," but declined to address the question because the district director had denied the extension in any event. Pet. App. 3 n.6.

allow petitioner to pursue his application for adjustment of status was itself untimely because, under *Banda-Ortiz*, petitioner's voluntary departure period had already elapsed, thus rendering him ineligible for adjustment of status, "and the agency lacked any further jurisdiction over [petitioner's] case." Pet. App. 5; see note 2, *supra*.[3]

Third, even if the court of appeals had reached the issue and had concluded that the BIA's grant of petitioner's motion to reopen failed to vacate petitioner's voluntary departure period, that conclusion would not conflict with the Seventh Circuit's decision in *Orichitch* v. *Gonzales*, 421 F.3d 595 (2005). See Pet. 17. *Orichitch* held that the BIA's grant of a motion to reopen in the circumstances of that case had the effect of vacating the BIA's prior voluntary departure order, such that the alien was no longer subject to the 10-year ineligibility period concerning his application for adjustment of status. 421 F.3d at 598. But in that case, unlike this one, the BIA's order did not specifically note that the alien may be ineligible for discretionary relief because he had overstayed the voluntary departure period, nor did the

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[3] Petitioner argues (Pet. 24-25) that, under *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), the court of appeals was barred from concluding that expiration of the voluntary departure period, which rendered petitioner ineligible for adjustment of status, divested the Board of authority to grant petitioner's motion to reopen. The court, however, understood that to have been the basis for the IJ's decision on remand, which was affirmed by the BIA. See Pet. App. 4 n.7. If the court correctly understood the administrative decisions, then there is no *Chenery* issue, for the court's decision reached essentially the same result. See *id.* at 4-5. Petitioner may well be correct that the court misunderstood the IJ's decision on this point, and that the BIA did not lack jurisdiction to grant reopening. But that subsidiary issue in the court's unpublished decision presents no issue warranting review by this Court.

BIA expressly observe that the alien could seek an extension of the voluntary departure period. Indeed, the BIA in this case specifically preserved the ability of the government to make arguments on remand concerning petitioner's "statutory * * * eligibility for adjustment of status." Pet. App. 10 n.2. Even assuming that the Seventh Circuit was correct in holding that the grant of the motion to reopen had the effect of vacating the voluntary departure period in the circumstances of *Orichhitch*, the grant of the motion to reopen in this case—in light of the BIA's specific recognition that petitioner may be ineligible for relief based on his overstay of the voluntary departure period set forth in the BIA's prior order—cannot be considered to have had the necessary effect of vacating that voluntary departure period and relieving petitioner from the consequences of not having departed.[4]

2. Petitioner challenges (Pet. 19-24) the court of appeals' holding that his filing of a motion to reopen did not automatically toll the running of his voluntary departure period. The court of appeals correctly rejected

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[4] Contrary to petitioner's suggestion (Pet. 16-17), the court of appeals' decision does not conflict with the Ninth Circuit's decision in *Lopez-Ruiz* v. *Ashcroft*, 298 F.3d 886 (2002). That decision raised no questions concerning voluntary departure or the effect of a grant of reopening on a voluntary departure period, but instead held that the grant of a motion to reopen renders a removal order non-final so as to divest the court of appeals of jurisdiction over a petition for judicial review.

Two courts of appeals have held that, where an alien files a motion to reopen after the expiration of the voluntary departure period, the BIA's grant of reopening does not have the effect of relieving the alien from the consequences of having failed to depart before the voluntary departure period expired. See *Singh* v. *Gonzales*, 468 F.3d 135, 139-140 (2d Cir. 2006); *Dacosta* v. *Gonzales*, 449 F.3d 45, 50-51 (1st Cir. 2006).

petitioner's tolling argument. Although that question has divided the courts of appeals, it does not warrant review in this case or at this time.

a. The court of appeals correctly concluded that petitioner's filing of a motion to reopen did not automatically toll the running of the voluntary departure period. "Voluntary departure is a discretionary form of relief. If an alien chooses to seek it—and that choice is entirely up to the alien—it can produce a win-win situation." *Naeem* v. *Gonzales*, 469 F.3d 33, 36 (1st Cir. 2006). As the court of appeals explained in its previous decision in *Banda-Ortiz*, voluntary departure is "an agreed-upon exchange of benefits between an alien and the Government," 445 F.3d at 389, in that it "offer[s] an alien a specific benefit—exemption from the ordinary bars on subsequent relief—in return for a quick departure at no cost to the government," *id.* at 390 (quoting *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004)). The grant of voluntary departure enables an alien to avoid the five to ten-year period of inadmissibility that would result from an order of removal, see 8 U.S.C. 1182(a)(9)(A); to select the destination point; to make arrangements for departure without the threat of custody; and to avoid any stigma associated with forced removal. See, *e.g.*, *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006).

"The benefits normally associated with voluntary departure," however, "come with corollary responsibilities." *Naeem*, 469 F.3d at 37. Because a principal purpose of voluntary departure is to provide an incentive for aliens to effect a prompt departure, see *Banda-Ortiz*, 445 F.3d at 390, an alien who seeks voluntary departure at the close of removal proceedings must demonstrate the means and intent to depart the country within a brief time, see 8 U.S.C. 1229c(b)(1)(D); 8 C.F.R.

1240.26(c)(1)(iv) and (3). The Act accordingly prescribes that the voluntary departure period cannot exceed 60 days when voluntary departure is granted at the close of removal proceedings (or 120 days when voluntary departure is granted before or during removal proceedings). 8 U.S.C. 1229c(a)(2)(A) and (b)(2). The statute further directs that, "[i]f an alien is permitted to depart voluntarily * * * and fails voluntarily to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible for a period of 10 years," to receive certain forms of discretionary relief including adjustment of status. 8 U.S.C. 1229c(d)(1)(B); see 8 C.F.R. 1240.26(a).

Contrary to petitioner's argument, the INA's provision that an alien may file one motion to reopen, see 8 U.S.C. 1229a(c)(6)(A), does not establish that the filing of such a motion automatically tolls the voluntary departure period. Petitioner contends (Pet. 22-23) that the BIA ordinarily will not have resolved a motion to reopen before the voluntary departure period expires, and that tolling is necessary to ensure that an alien has a meaningful opportunity to seek reopening. Petitioner thus appears to contend that tolling is necessary in order to give effect to both the Act's provision for an alien to file a motion to reopen and its provision authorizing the Attorney General to permit voluntary departure. That contention is mistaken.

As the Fourth Circuit has explained, the "voluntary departure provision" establishing the maximum departure period of 60 or 120 days "applies to *certain* removable aliens" who qualify for that relief, "while the motion to reopen provision applies to *all* aliens subject to removal." *Dekoladenu* v. *Gonzales*, 459 F.3d 500, 505-506 (2006). Indeed, only 11% of removable aliens were

granted voluntary departure in 2005. See *id.* at 506 n.5. Accordingly, "[f]ollowing the normal rule of statutory construction, the more specific voluntary departure provision governs in those limited situations in which it applies." *Id.* at 506. Motions to reopen are unaffected in other cases.

Moreover, while the INA provides that an alien may file one motion to reopen, it confers no right to substantive relief. To the contrary, the granting of reopening is discretionary. See p. 4, *supra*. Similarly, the granting of voluntary departure is discretionary with the Attorney General, and the Attorney General is expressly authorized to limit eligibility for additional classes of aliens. See p. 2, *supra*. There accordingly is no inconsistency with the Act if, under applicable procedures, an alien who files a motion to reopen and chooses to remain in the country until the BIA acts upon it thereby gives up the benefits of voluntary departure. See 8 U.S.C. 1229c(e).

The conclusion that the filing of a motion to reopen does not automatically toll the running of the voluntary departure period, or permit an alien to disregard his undertaking to depart within the time allowed, is strongly supported by this Court's decision in *Stone* v. *INS*, 514 U.S. 386 (1995). There, the Court held that a final order of deportation remains final notwithstanding the filing of a motion to reopen, and that the time for filing a petition for judicial review of that order therefore is not tolled by the filing of a motion for reconsideration. See *id.* at 392-395. In reaching that conclusion, the Court pointed out that it was the longstanding position of the Attorney General, "a view we presume Congress understood when it amended the Act in 1990," that the filing of a motion for reconsideration (or reopening) does

not serve to stay the deportation order. See *id.* at 398 (citing 8 C.F.R. 3.8 (1977)). Similarly, here, we must presume that Congress understood that rule when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, and the current regulations embody the same rule. See 8 C.F.R. 1003.2(f). Because a provision in a BIA decision allowing voluntary departure is simply an alternative to a formal removal order in the same BIA decision—allowing the alien to depart on his own within a specified period of time rather than being removed by the government—it follows from that regulation that the voluntary departure requirement of the decision is likewise not stayed or tolled by the filing of a motion to reopen.[5]

By contrast, "mandat[ing] tolling of the voluntary departure period when an alien files a motion to reopen would have the effect of rendering the time limits for voluntary departure meaningless." *Dekoladenu*, 459 F.3d at 506; see *Banda-Ortiz*, 445 F.3d at 390 ("Automatic tolling would effectively extend the validity of [an alien's] voluntary departure period well beyond the sixty days that Congress has authorized."). Accepting petitioner's tolling argument also would substantially deny the government the benefits of voluntary departure —*i.e.*, securing a prompt departure without the need to devote the resources that attend the process of issuing

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[5] Indeed, the BIA held, prior to IIRIRA, that the filing of a motion to reopen did *not* toll the voluntary departure period. See *In re Shaar*, 21 I. & N. Dec. 541 (1996). Contrary to the Ninth Circuit's view in *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1286-1287 (9th Cir. 2005), there is no indication that Congress intended to overturn that rule when it enacted IIRIRA, which, after all, imposed additional statutory restrictions on both voluntary departure and motions to reopen.

and executing an order of removal—without requiring petitioner to bear the associated costs. *Banda-Ortiz*, 445 F.3d at 390. "If filing a motion to reopen automatically tolled the voluntary departure period, aliens who have been granted voluntary departure would have a strong incentive to file a motion to reopen in order to delay their departure." *Dekoladenu*, 459 F.3d at 506; compare *Stone*, 514 U.S. at 400-401 (explaining that because a removal order remains final and subject to execution notwithstanding the filing of a motion for reconsideration, Congress has removed the incentive for aliens to file meritless motions). And "[b]ecause voluntary departure is a privilege that is only available to a subset of aliens, it is neither 'absurd' nor 'nonsensical' to require aliens who wish to reap the benefits of voluntary departure to give up their right to a resolution of a motion to reopen." *Ibid.*[6]

The Fourth Circuit concluded in *Dekoladenu* that "both the plain language of the statute and clear congressional intent explicitly limit the time allowed for voluntary departure and do not allow for judicial tolling of these limits" based on the filing of a motion to reopen. 459 F.3d at 504. But even if the relevant statutory provisions are regarded as ambiguous on the matter, the

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[6] If petitioner had sought a remand to the IJ upon learning during the pendency of his BIA appeal that the employment-based visa petition had been approved, see pp. 5-6, *supra*; 8 C.F.R. 1003.2(c)(4), the BIA presumably would have remanded to the proceedings to the IJ to permit petitioner to seek adjustment of status. Petitioner then could have had his adjustment application resolved without being subject to any pending voluntary departure period. Petitioner, however, did not file a motion to remand, and the BIA accordingly proceeded to issue its decision dismissing petitioner's appeal and granting him voluntary departure, subject to the requirement that he effect departure within 30 days.

agency's conclusion that the filing of a motion to reopen does not automatically toll the voluntary departure period under the existing statutory and regulatory scheme would be entitled to deference. See *id.* at 507-508; *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

The BIA's voluntary departure order in this case specifically informed petitioner that failure to depart within 30 days of the order would trigger the ten-year period of ineligibility for adjustment of status. See Pet. App. 12; see also 8 U.S.C. 1229c(d) ("The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection."). Moreover, the governing regulations provide that an IJ or the BIA "may reinstate voluntary departure in a removal proceeding that has been reopened * * * *if reopening was granted prior to the expiration of the original period of voluntary departure*," and further provide that "[i]n no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in" the Act. 8 C.F.R. 1240.26(h) (emphasis added). The evident corollary is that, if reopening is *not* granted "prior to the expiration of the original period of voluntary departure," no reinstatement of voluntary departure or extension of the voluntary period is permissible.

b. As petitioner correctly explains, the courts of appeals are divided on whether the filing of a motion to reopen automatically tolls the voluntary departure period. Four courts of appeals have held that the filing of a motion to reopen automatically triggers such tolling. See *Kanivets* v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya* v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte* v. *Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe* v. *United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006). Two courts of appeals (including the court

below) have reached the contrary conclusion. See *Dekoladenu* v. *Gonzales*, 459 F.3d 500 (4th Cir. 2006); *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387 (5th Cir. 2006), No. 06-477, petition for cert. pending (filed Sept. 28, 2006).

Although the courts of appeals are divided on the question, review is not warranted in this case or at this time. In the first place, the court of appeals' decision is unpublished and does not establish circuit precedent. See Pet. App. 1 n.*. The court of appeals simply followed its prior published decision in *Banda-Ortiz*. See Pet. 4-5. The government has filed a response to the petition for a writ of certiorari in *Banda-Ortiz* noting that the case has become moot and therefore recommending that the petition be granted, the court of appeals' decision be vacated, and the case be remanded with instructions to dismiss the petition for judicial review. See Resp. Br., *Banda-Ortiz* (No. 06-477), *supra*. If the Court accepts the government's recommendation and vacates the court of appeals' decision in *Banda-Ortiz*, there would then be no binding Fifth Circuit precedent on whether the filing of a motion to reopen automatically tolls the voluntary departure period.

The potential absence of any circuit precedent, and the resulting possibility that the Fifth Circuit ultimately could adopt a view different from the one it initially espoused in *Banda-Ortiz*, counsels against granting certiorari to review that court's unpublished opinion in this case. Even if the issue otherwise warranted review, the Court should await a final resolution of the issue by the Fifth Circuit before granting review to address the issue

in a case from that court, or await a suitable vehicle from another court of appeals.[7]

There are, moreover, broader considerations that render review of the tolling issue by this Court unwarranted at this time. First, in light of the judicial decisions and issues that have been raised, the Department of Justice has determined that it will promulgate regulations specifically regarding the tolling question presented by this case. That rulemaking process will afford the Department an opportunity to address the various statutory provisions bearing on reopening and voluntary departure, consider the various policy issues that have been raised, and further exercise the authority and discretion vested in the Attorney General under the relevant statutory provisions. Review of the tolling issue by this Court should await the issuance of such regulations.[8]

Second, as the certiorari petition in *Banda-Ortiz* points out (at 16-17), the Senate and the House of Representatives passed bills in the last Congress that contained provisions that would definitively resolve the toll-

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[7] The Fourth Circuit in *Dekoladenu* recently issued a decision holding that the filing of a motion to reopen does not automatically toll the voluntary departure period. The alien in that case has obtained an extension of the time in which to file a petition for a writ of certiorari to March 8, 2007 (Application No. 06A755).

[8] In 1997, when the Department, after notice and comment, promulgated interim regulations implementing the 1996 amendments to the INA, it discussed the tolling issue in the preamble (see *Banda-Ortiz* Pet. 27) and stated that the issue would be addressed when final regulations were issued on a variety of subjects. See 62 Fed. Reg. 10,312, 10,316 (1997). No such comprehensive regulations have been issued. However, as stated in the text, the Department has now determined that further regulations will be issued on the specific question of tolling presented in this case.

ing issue on a prospective basis in a manner consistent with the Fifth Circuit's decision in this case. Although comprehensive immigration reform bills have not yet been introduced in either the House or the Senate in this Congress, it is anticipated that such bills will be taken up by Congress during the current Session.[9]

Thus, not only does the Department of Justice plan to address the issue by regulation, but there also is a prospect that Congress will do so. For the foregoing reasons, the petition for a writ of certiorari should be denied. In the alternative, if the Court grants the petition in *Banda-Ortiz* and vacates the judgment of the court of appeals, as the government has recommended, the Court could grant the petition in this case, vacate the judgment below, and remand the case to permit the court of appeals to address the issue in light of the vacatur of the Fifth Circuit's *Banda-Ortiz* precedent on the issue.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, if the Court grants the petition for a writ of certiorari in *Banda-Ortiz* v. *Gonzales*, No. 06-477, and vacates the judgment of the court of appeals in that case, the Court may wish to consider granting the petition in this case, vacating the judgment below, and

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[9] In addition, we have been informed that the tolling issue has been raised in a number of cases pending before the BIA.

remanding the case to permit the court of appeals to address the claims raised by petitioner in light of this Court's disposition in *Banda-Ortiz*.

Respectfully submitted.

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No. 06-610

IN THE

Supreme Court of the United States

JAMAL MOORANI,

Petitioner,

v.

ALBERTO R. GONZALES, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner submits this Supplemental Brief pursuant to Supreme Court Rule 15(8) to address the effect of this Court's denial of certiorari in *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006), *cert. denied*, 75 U.S.L.W. 3207 (No. 06-477) (March 23, 2007), on this petition.

Both *Banda-Ortiz* and this case arise out of the United States Court of Appeals for the Fifth Circuit; and the Fifth Circuit's published decision in *Banda-Ortiz* was the predicate for its unpublished decision in this case. The petition in *Banda-Ortiz* raised the same question as the question presented in this case that currently divides the courts of appeals—whether a motion to reopen proceedings before the Board of Immigration Appeals ("BIA") automatically tolls the running of a previously-established voluntary-departure period.

In his certiorari petition, Banda-Ortiz showed that the courts of appeals are split on this question, *Banda-Ortiz* Pet. at 7-11, explained that the question presented is important, recurring, and affects a substantial number of aliens, *id.* at 11-17, and illustrated why the Fifth Circuit's no-tolling position is inconsistent with the statutory scheme, *id.* at 18-28. The Government filed a Brief for Respondent, acknowledging the split in the circuits. *Banda-Ortiz* Resp. at 10. However, as the Government urged and as was acknowledged by Banda-Ortiz in his Reply, *Banda-Ortiz* was not a proper vehicle to resolve the split: Banda-Ortiz's motion to reopen was granted by the BIA while his petition for certiorari was pending, and thus his case became moot. *Banda-Ortiz* Resp. at 10; *Banda-Ortiz* Reply at 1-2. Both parties agreed that, therefore, Banda-Ortiz's petition for certiorari should be denied. *Id.* The Government, however, also suggested that, in the alternative, the Court could have "grant[ed] the petition, vacate[d] the court of appeals' judgment, and remand[ed] the case with instructions to dismiss." *Banda-Ortiz* Resp. at 10 (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). On March 23, 2007, the Court denied the petition in *Banda-Ortiz*.

In opposing certiorari in this case, the Government's principal objection was that the Fifth Circuit's opinion is unpublished and that, if this Court were to agree with the Government's proposal for the Court to order the Fifth Circuit to vacate its decision in *Banda-Ortiz* as moot, there would have been a "possibility that the Fifth Circuit ultimately could adopt a view different" from that in *Banda-Ortiz*. *Moorani* Opp. at 18. That objection was meritless before the Court's denial of certiorari in *Banda-Ortiz* because the Fifth Circuit's position on the question presented here is abundantly clear: The Fifth Circuit's panel issued a lengthy published decision in *Banda-Ortiz* and, after a full briefing for *en banc* review, the Fifth Circuit denied *en banc* review over five dissents. *Moorani* Reply at 4. Moreover, petitioner in this case filed a motion for rehearing *en banc* in the Fifth Circuit that was also denied following the denial of *en banc* review in *Banda-Ortiz*.

Now that this Court has denied certiorari in *Banda-Ortiz*, this objection has effectively been voided; the Fifth Circuit's decision in *Banda-Ortiz* remains the law of that Circuit and there can be no question of its continuing validity. Thus, any doubts that the Government raised as to the worthiness of this case for certiorari based on the possibility that *Banda-Ortiz* would be vacated have now been eliminated. Because the Court left in place the Fifth Circuit's decision in *Banda-Ortiz*, there is also no question about the wide-ranging split of authority on the question presented: The Fifth Circuit is firmly aligned with the Fourth Circuit, holding that a motion to reopen that is not resolved during the voluntary departure period is forfeited, while the Third, Eighth, Ninth, and Eleventh Circuits hold that the filing of a motion to reopen during a previously-established voluntary departure period tolls that period until the motion to reopen is resolved; and the Seventh Circuit has ruled that, where such a motion to reopen is granted by the BIA, the underlying departure order is rendered void. *Moorani* Reply at 2-5.

Accordingly, for this reason and the reasons set forth in the Petition for Certiorari and Reply Brief, the Court should grant the petition for certiorari in this case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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No. 06-610

IN THE

Supreme Court of the United States

JAMAL MOORANI,

Petitioner,

v.

ALBERTO R. GONZALES, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

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Sidikhouya v. Gonzales, 407 F.3d 950, 952 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005); *Ugokwe v. United States Attorney General*, 453 F.3d 1325, 1331 (11th Cir. 2006). And the Seventh Circuit had ruled that, where such a motion to reopen is granted by the BIA, the underlying departure order is rendered void. *See Orichitch v. Gonzales*, 421 F.3d 595, 598 (7th Cir. 2005); *see also* Reply at 2-5.

Since the filing of the Reply and First Supplemental Brief in this case, the First Circuit has joined the Fifth and Fourth Circuits, thus creating a 4-3 split in the courts of appeals on the tolling issue. In *Chedad*, the First Circuit held that the relevant statutory provisions "simply do not contemplate suspending the voluntary departure period so that aliens who have chosen that form of relief also can pursue reopening." Supp. Br. App. 13a. Explicitly disagreeing with the approaches of the Third, Eighth, Ninth, and Eleventh Circuits, the First Circuit emphasized that "[t]hough there is some force to th[eir] reasoning, we believe that it proceeds from an erroneous premise, namely, that motions to reopen are available *only* in proceedings where voluntary departure has been granted." *Id.* at 9a (emphasis in original).

Judge Lipez filed a lengthy and vigorous dissent. *Id.* at 16a-25a. He reasoned that "[i]nstead of effectively writing an exception into the motion to reopen provision on such dubious grounds, I would follow the majority of circuit courts and hold that a motion to reopen, filed before the expiration of the voluntary departure period, automatically tolls the running of that period until the BIA resolves the motion." *Id.* at 18a (Lipez, J., dissenting).

Besides deepening the circuit split presented on this issue, the First Circuit has also deepened the split regarding the effect of granting a motion to reopen. As noted in the Reply, the Seventh Circuit has held, in *Orichitch*, 421 F.3d at 598, that where the BIA granted a motion to reopen that had been filed before, but decided after, a previously-established

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Petitioner submits this Second Supplemental Brief pursuant to Supreme Court Rule 15(8) to call to the Court's attention the case of *Chedad v. Gonzales*, __ F.3d __, 2007 WL 2178427 (1st Cir. July 31, 2007) (Supp. Br. App. 1a-25a), which was decided by the First Circuit after the conclusion of the petition's briefing. The petition in this case raises the related questions (1) whether a motion to reopen proceedings before the Board of Immigration Appeals ("BIA") automatically tolls the running of a previously-established voluntary departure period and (2) whether the grant of a motion to reopen removal proceedings automatically vacates an underlying voluntary departure order. Pet. at i; Opp. at i. The decision by a divided panel of the First Circuit in *Chedad* directly implicates the questions presented by the petition by deepening the existing circuit split on these issues.

In his certiorari petition, Moorani showed that the courts of appeals are split on these questions, Pet. at 20-22; Reply at 2-5, explained that the questions presented are important, recurring, and affect a substantial number of aliens, Pet. at 22-24; Reply at 5-7, and demonstrated why the Fifth Circuit's no-tolling position is inconsistent with the statutory scheme, Pet. at 18-20; Reply at 7-10. The Government filed a Brief for the Respondent in Opposition, acknowledging the split in the circuits on the tolling question. Opp. at 17.

As of the time of the last-filed brief in this Court, the Fifth Circuit was firmly aligned with the Fourth Circuit in holding that a motion to reopen that is not resolved during the voluntary departure period is forfeited. *See Banda-Ortiz v. Gonzales*, 445 F.3d 387, 391 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007); *Dekoladenu v. Gonzales*, 459 F.3d 500, 504 (4th Cir. 2006), *cert. pending*, No. 06-1285 (filed Mar. 22, 2007). By contrast, the Third, Eighth, Ninth, and Eleventh Circuits had held that the filing of a motion to reopen during a previously-established voluntary departure period tolls that period until the motion to reopen is resolved. *See Kanivets v. Gonzales*, 424 F.3d 330, 336 (3d Cir. 2005);

voluntary departure period had expired, the grant of the motion to reopen necessarily vacated the underlying voluntary departure order. *See* Reply at 3. Moorani would have prevailed under this standard. *Id.* However, the First Circuit has now reaffirmed its decision in *Ducosta v. Gonzales*, 449 F.3d 45, 50-51 (1st Cir. 2006), and has held that a motion to reopen filed and granted after the voluntary departure period had expired does not void the underlying voluntary departure order. *Chedad*, Supp. Br. App. 14a-15a. Whether viewed as part of the tolling split, or creating a 2-3 split in its own right, it is clear that there is confusion and inconsistency in the lower courts on the effect of granting a motion to reopen. *Compare Orichitch*, 421 F.3d at 598 (underlying order vacated when motion to reopen is granted), *and Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (same), *with Singh v. Gonzales*, 468 F.3d 135, 139-40 (2d Cir. 2006) (grant of motion to reopen does not void the underlying voluntary departure order); *Chedad*, Supp. Br. App. 14a-15a (same), *and Odogwu v. Gonzales*, 217 F. App'x 194, 198-99 (4th Cir.) (per curiam) (same), *cert. pending*, No. 06-11200 (filed May 7, 2007); *see also* Reply at 3 & n.2.

This latest divided decision by yet another circuit to confront this issue in just the last two years demonstrates that this Court's intervention is necessary to resolve the conflict among the courts of appeals on these important and recurring questions of immigration law. As judges on both sides of the debate have acknowledged, the rule adopted by the First, Fourth, and Fifth Circuits produces harsh results. *See, e.g.*, *Chedad*, Supp. Br. App. 15a ("We recognize that the consequences of our decision are harsh . . . ."). There is no doubt that this vigorous disagreement within and between courts of appeals is not going to abate, but will continue to proliferate, thereby rendering impossible the much-needed certainty and nation-wide uniformity required in immigration law. *See Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (noting "the Nation's need to speak with one voice in

immigration matters"). As emphasized by Judge Lipez, "stark outcome[s] may be repeated many times over by the failure to harmonize the conflicting statutory provisions at issue in this case in a sensible and fair manner." *Chedad*, Supp. Br. App. 24a-25a (Lipez, J., dissenting).

Accordingly, for this reason and the reasons set forth in the Petition for Certiorari, Reply Brief, and First Supplemental Brief, the Court should grant the petition for certiorari in this case.

CONCLUSION

The petition for certiorari should be granted.

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August 16, 2007

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Adil CHEDAD, Petitioner,

v.

Alberto R. GONZALES, Attorney General, Respondent.

No. 05-2782
Heard Sept. 13, 2006
Decided July 31, 2007

Before SELYA, LIPEZ, and HOWARD, Circuit Judges.

HOWARD, Circuit Judge:

Adil Chedad petitions for review of a decision of the Board of Immigration Appeals ("BIA") upholding the order of an Immigration Judge ("IJ") pretermitting his application for adjustment of status and declaring him removable from the United States. The basis of the IJ's decision, and its affirmance, was that Chedad was ineligible for any such adjustment because he had overstayed a period of voluntary departure imposed as part of a prior BIA order closing the removal proceedings against him.[1] Before the voluntary departure period lapsed, however, Chedad had filed a motion with the BIA to reopen those proceedings due to previously unavailable evidence.

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[1] The Immigration and Nationality Act ("the INA") provides a mechanism for an alien, subject to the discretion of the Attorney General and other limitations, "to depart the United States voluntarily at his own expense" in lieu of continued participation in removal proceedings. 8 U.S.C. §§ 1229c(a)(1), (b)(1) (2005).

The BIA granted the motion to reopen and remanded the matter to the IJ, who, as just noted, deemed Chedad ineligible for any further relief because he had disobeyed the voluntary departure order. Chedad argues that the BIA erroneously affirmed the IJ's ruling, either because the filing of his motion to reopen tolled the running of the voluntary departure period, or because the BIA's allowance of the motion stripped the voluntary departure order of any legal significance. We deny Chedad's petition for review.

I.

The Immigration and Naturalization Service ("INS") commenced removal proceedings against Chedad, a native of Morocco, in 1997, asserting that he had remained in the United States beyond the time permitted by the six-month nonimmigrant visa issued to him in 1994.[2] Chedad appeared before the IJ with counsel on May 28, 1998 and admitted overstaying his visa. He also requested a continuance of the proceedings on the ground that his wife, Joanne S. Francisco—a lawful permanent resident of the United States—had filed an application for citizenship, as well as a visa application on Chedad's behalf, known as an I-130 petition. *See* 8 U.S.C. § 1154(a)(1)(B)(i); 8 C.F.R. § 204.1(a)(1) (2006).[3] If Francisco became a naturalized citizen of the United States, then Chedad would become immediately eligible to apply for adjustment of status to that

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[2] In March 2003, the INS was abolished and its functions were transferred to the newly formed Department of Homeland Security. *See* Homeland Security Act of 2002, Pub.L. No. 107-296, §§ 451(b) *and* 471(a), 116 Stat. 2135, 2195 *and* 2205, *codified at* 6 U.S.C. §§ 271(b) *and* 291(a) (Supp. 2006). For consistency, we will refer to the responsible agency as "the INS" throughout our opinion.

[3] Since Chedad's proceedings before the BIA, many of its regulations have been recodified without changing their substance. For purposes of clarity, we will cite to the applicable regulations as currently codified.

of an alien admitted for lawful permanent residence. *See* 8 U.S.C. § 1151(b)(2)(A)(i). The IJ therefore granted Chedad's motion for a continuance to allow the processing of his spouse's applications. Chedad later received a second continuance for that purpose. Meanwhile, Francisco's I-130 petition on Chedad's behalf was approved on October 21, 1998.

Francisco's application for naturalization was still pending when removal proceedings against Chedad resumed on March 4, 1999. Though Chedad sought another continuance on that ground, the IJ refused, giving him the choice between the entry of a final order of removal and an opportunity to seek voluntary departure. *Id.* § 1229c(b). Chedad elected voluntary departure and received a continuance so that he could obtain a valid travel document for the purpose of leaving the country.

When Chedad reappeared before the IJ on June 11, 1999, he again moved for a continuance to allow the processing of his wife's application for citizenship; the IJ again denied the motion. Instead, the IJ granted Chedad's motion for voluntary departure, requiring him to leave in sixty days. *Id.* § 1229c(b)(2). The IJ also warned Chedad of the consequences of disobeying the voluntary departure order, including the loss of the opportunity to pursue adjustment of immigration status through several different avenues for a period of ten years. *Id.* § 1229c(d)(1) (Supp. 2006).[4]

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[4] In 2006, Congress amended 8 U.S.C. § 1229c(d) through the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub.L. No. 109-162 § 812, 119 Stat. 2960, 3057 (2006). This amendment, in relevant part, renumbered the penalty provision of § 1229c(d) as § 1229c(d)(1). For purposes of clarity, we will cite to the current subsection number throughout our opinion.

Chedad appealed the IJ's denial of his final motion for a continuance to the BIA. During the pendency of the appeal, on May 24, 2001, Francisco completed the naturalization process. On July 15, 2002, with the appeal still pending, Chedad filed a motion to remand with the BIA, citing his newly minted status as the spouse of a United States citizen, as well as the prior approval of his I-130 petition.

The BIA dismissed Chedad's appeal and denied his motion to remand in an order issued on October 25, 2002. First, the BIA ruled that the IJ had not abused her discretion in denying Chedad's final request for a continuance of the removal proceedings. Second, the BIA denied the motion to remand because it was unaccompanied by an application for adjustment of Chedad's status to that of an alien admitted for lawful permanent residence pursuant to 8 U.S.C. § 1255(a), as required by BIA rules. 8 C.F.R. § 1003.2(c)(1). The BIA granted Chedad thirty days from the date of its order to depart the country voluntarily, repeating the IJ's admonition about the consequences of any failure to do so.[5]

On November 22, 2002, before the expiration of the voluntary departure period, Chedad filed a motion with the BIA to reopen the removal proceedings, again asserting that he had become eligible for adjustment of status under § 1255(a). This filing, made within ninety days of the BIA's decision as required by the INA, 8 U.S.C. § 1229a(7)(C)(1), and its implementing regulations, 8 C.F.R. § 1003.2(c)(2), included the application for adjustment of status and supporting materials that had been omitted from Chedad's

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[5] The execution of the IJ's sixty-day voluntary departure order had been stayed pending Chedad's appeal. *See* 8 C.F.R. § 1003.6(a). Because thirty days had already expired by the time Chedad filed the appeal, thirty days of voluntary departure time remained at the time of the BIA's decision. *See id.* § 1240.26(f).

earlier motion to remand. Noting that Chedad's motion to reopen "demonstrate[d] that he is now prima facie eligible for adjustment of status," the BIA granted the motion in an order dated February 21, 2003, remanding the case to the IJ "for proceedings consistent with this opinion." The BIA's order made no mention of the voluntary departure requirement previously imposed.

When the proceedings found their way back to the IJ, however, the prior voluntary departure order—which Chedad had not satisfied—proved dispositive. The IJ determined that, because Chedad had failed to leave the United States as required, he had become ineligible for adjustment of status by operation of 8 U.S.C. § 1229c(d). The IJ rejected Chedad's arguments that (1) the BIA had nullified its voluntary departure order by granting his motion to reopen, and (2) the filing of his motion to reopen, on November 22, 2002, had tolled the running of the voluntary departure period. In rejecting these arguments, the IJ relied on *Matter of Shaar*, 21 I. & N. Dec. 541 (BIA 1996), *aff'd*, 141 F.3d 953 (9th Cir. 1998), which held that the filing of a motion to reopen does not itself toll the voluntary departure period. The IJ therefore pretermitted Chedad's application for adjustment of status and ordered him removed from the United States.

Chedad appealed, repeating the arguments he had made before the IJ. In particular, Chedad noted that *Shaar* had recently been overruled by the Ninth Circuit, which held that a timely motion to reopen could toll the voluntary departure period. *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005). The BIA, however, did not consider itself bound by *Azarte*, or similar decisions from other circuits, in a case arising within this court's appellate jurisdiction, and therefore rejected Chedad's tolling argument. As to Chedad's contention that the BIA had emasculated its prior voluntary departure order by granting the motion to reopen,

the BIA explained that the latter decision "was based solely on the fact that [Chedad] had established prima facie eligibility for relief and not based on [the BIA's] adjudication of the merits of his claim; also, [his] motion had not been opposed by [the INS] so no issues were raised to rebut [his] eligibility for relief." The BIA therefore upheld the IJ's ruling that Chedad was disqualified from seeking adjustment of status based on his disobedience of the voluntary departure order-a fact that had not been considered by the BIA in previously deciding to remand the case. Chedad then petitioned this court for review.

In his petition, Chedad argues that the BIA mistakenly upheld the IJ's reliance on the voluntary departure order as a basis for disqualifying him from further relief. We have jurisdiction over such a petition under 8 U.S.C. § 1252(a)(1), which provides for "review of a final order of removal," notwithstanding the jurisdiction-stripping provision of § 1252(a)(2)(B)(i). *DaCosta v. Gonzales*, 449 F.3d 45, 49 (1st Cir. 2005) (exercising jurisdiction over BIA's ruling that violation of voluntary departure order rendered alien ineligible for adjustment of status because BIA did not reach merits of adjustment claim).

Chedad contends that the BIA erred in refusing to treat (1) the filing of his motion to reopen as tolling the voluntary departure period, or (2) the allowance of the motion as depriving the voluntary departure order of its effect. In considering such arguments, "[w]e afford de novo review to the BIA's legal conclusions, but cede some deference to its interpretations of the INA." *Da Silva v. Ashcroft*, 394 F.3d 1, 5 (1st Cir. 2005) (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L.Ed.2d 590 (1999)).

II.

Chedad argues that the provisions of the INA authorizing motions to reopen, on the one hand, and voluntary departure, on the other, conflict in such a way as to require the timely filing of the former to toll the running of the latter. This argument has prevailed in a number of circuits, *see Ugokwe v. Attorney Gen.*, 453 F.3d 1325, 1331 (11th Cir. 2006); *Kanivets v. Gonzales*, 424 F.3d 330, 335 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005); *Azarte*, 394 F.3d at 1289, but has failed in others, *see Dekoladenu v. Gonzales*, 459 F.3d 500, 507 (4th Cir. 2006); *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 391 (5th Cir. 2006). We now consider the question.

The INA's voluntary departure provision plays an important part in the smooth functioning of the country's immigration procedures. *See, e.g., DaCosta*, 449 F.3d at 50; *Bocova v. Gonzales*, 412 F.3d 257, 265 (1st Cir. 2005). Subject to a number of qualifications, the Attorney General, at his discretion, may grant an alien's request to depart the United States voluntarily, either in lieu of commencing deportation proceedings or at the conclusion of those proceedings. 8 U.S.C. §§ 1229c(a)(1), (b)(1). From the alien's perspective, voluntary departure offers certain benefits, among them avoiding the penalties attendant to deportation, which include five- or ten-year bars on seeking readmission to the country. *Id.* §§ 1182(a)(9)(A)(i), (ii); *Bocova*, 412 F.3d at 265 & n .1. The government also benefits from voluntary departure by "expediting departures and eliminating the costs associated with deportation." *Bocova*, 412 F.3d at 265.

The INA imposes harsh penalties, however, on aliens who do not live up to their end of the voluntary departure bargain. An alien who "fails voluntarily to depart the United States within the time period specified" receives monetary

sanctions and becomes ineligible for a number of forms of immigration relief, including adjustment of status, for a period of ten years. 8 U.S.C. § 1229c(d)(1). The IJ relied on this provision in pretermitting Chedad's application for adjustment of status based on his wife's naturalization. The INA also strictly limits the time allowable for the alien to leave the United States. In a case, like Chedad's, of voluntary departure ordered at the conclusion of deportation proceedings, the voluntary departure period cannot exceed 60 days.[6] *Id.* § 1229c(b)(2).

The availability of motions to reopen removal proceedings is also restricted. *Id.* § 1229a(7). Such motions must be based on material evidence that "was not available and could not have been discovered or presented at the former hearing," including "circumstances that have arisen subsequent to the hearing" which bear on the alien's eligibility for discretionary relief. 8 C.F.R. § 1003.2(c)(1). An alien ordinarily may file only one such motion after the close of proceedings. 8 U.S.C. § 1229a(7)(A). Furthermore, and of particular note here, a motion to reopen "shall be filed within 90 days of the date of an administrative order of removal," subject to certain exceptions inapplicable to Chedad. *Id.* § 1229a(7)(C)(1).

Those courts holding that a timely motion to reopen suspends the running of the voluntary departure period have perceived a conflict between § 1229a(7)(C)(1), which allows ninety days to file a motion to reopen, and § 1229c(b)(2), which limits voluntary departure granted at the close of removal proceedings to just sixty days. *Ugokwe*, 453 F.3d at 1331; *Kanivets*, 424 F.3d at 335; *Sidikhouya*, 407 F.3d at 952; *Azarte*, 394 F.3d at 1286. While the motion to reopen

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[6] By contrast, a voluntary departure period granted prior to the end of removal proceedings cannot exceed 120 days. 8 U.S.C. § 1229c(a)(2)(A).

had long been recognized in deportation proceedings as a matter of practice and, later, by administrative rulemaking. Congress did not put its imprimatur on the vehicle until the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), which "provided the [aforementioned] statutory right to a motion to reopen." *Azarte*, 394 F.3d at 1283 (citing 8 U.S.C. § 1229(c)(6)(A) (1996)). IIRAIRA also, however, "drastically limited the time allowed for voluntary departure," *id.* at 1285, imposing, *inter alia*, the sixty-day limitation found at 8 U.S.C. § 1229c(b)(2).

The joint effect of these provisions is practically to foreclose the availability of motions to reopen in most cases where the alien has received voluntary departure. As *Azarte* observes, even an alien who seeks reopening at the outset of the voluntary departure period has little hope of receiving a decision before the expiration of the departure deadline. 394 F.3d at 1287. If the alien defies the voluntary departure order by remaining in the United States pending action on the motion to reopen, the alien will be automatically cut off from a number of avenues of relief by operation of § 1229c(d)(1), including, in many cases, the very relief he or she sought reopening to pursue, *i.e.*, adjustment of status. On the other hand, if the alien complies with the order and leaves, the BIA will treat the motion as withdrawn, also precluding any relief. 8 C.F.R. § 1003.2(d). *Azarte* and its progeny reason that this "'Catch-22' situation" calls for tolling the voluntary departure period while the alien awaits the BIA's ruling on a timely motion to reopen. *Kanivetz*, 424 F.3d at 334; *see also Ugokwe*, 453 F.3d at 1331; *Sidikhouya*, 407 F.3d at 952.

Though there is some force to this reasoning, we believe that it proceeds from an erroneous premise, namely, that motions to reopen are available *only* in proceedings where voluntary departure has been granted. Subsection

1229a(7), however, permits "one motion to reopen proceedings under this section," which include *all* "proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a(1)(A). Proceedings where voluntary departure has not been granted, naturally, spawn no "conflict" between the deadline for moving to reopen and the deadline for leaving the country voluntarily.

In our view, holding aliens to the sixty-day limit on voluntary departure imposed by § 1229c(b)(2), despite the ninety-day limit on motions to reopen granted by § 1229a(7)(C)(1), does not "deprive[ ] the motion to reopen provision of meaning by eliminating the availability of such motions to those granted voluntary departure." *Azarte*, 394 F.3d at 1288. Rather, § 1229a(7) has significance for aliens who have not sought the benefits of voluntary departure and can therefore pursue reopening without regard for the sixty-day deadline.[7] *See Dekoladenu*, 459 F.3d at 505-06. We cannot accept *Azarte's* reasoning that Congress could not have intended to subject motions to reopen to the voluntary departure cutoff because that would "preclude their availability in a significant number of cases, likely a substantial majority." 394 F.3d at 1289; *accord Banda-Ortiz*, 445 F.3d at 393 (Smith, J., dissenting). *Azarte* did not cite any authority for the proposition that voluntary departure

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[7] Without disputing this point, the dissent nevertheless joins *Azarte* in rejecting "the proposition that Congress, while expressly codifying the tradition of motions to reopen, intended sub silentio to preclude their availability" in cases of voluntary departure. 394 F.3d at 1289. As we explain, however, because our reading of IIRAIRA will preclude (at least as a practical matter) motions to reopen only in the relatively small percentage of cases where aliens elect voluntary departure, we hardly think it "implausible" that Congress intended such a result. Indeed, we think it considerably less plausible that, despite IIRAIRA's unmistakable purpose in ensuring that voluntary departure in fact results in the alien's leaving the United States in a timely manner, Congress intended to allow an alien to avoid doing so through the simple expedient of filing a motion to reopen.

is entered in "a substantial majority" of removal proceedings. In fact, as the Fourth Circuit noted in *Dekoladenu*, 459 F.3d at 506 n. 5, available statistics indicate that voluntary departure was granted in just ten percent of removal cases in 2006, and has never been granted in more than eighteen percent of them in any of the last five years. Executive Office for Immigration Review, *FY 2005 Statistical Yearbook* Q1 (2006), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf (last visited May 25, 2007).

We read §§ 1229a(7)(C)(1) and 1229c(b)(2), then, as evincing a congressional intent to make the benefits of voluntary departure available only to aliens who agree to give up the fight and leave the country willingly.[8] *See Banda-Ortiz*, 445 F.3d at 391. This may or may not be wise policy, but it is, we believe, the most plausible construction of the statute. As *Azarte* notes, the pre-IIRAIRA version of the INA put no time limits on voluntary departure, 8 U.S.C. § 1254(e) (1995), resulting in departure periods that frequently measured one year or more. 394 F.3d at 1284.

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[8] We do not imply that aliens granted voluntary departure may not move to reopen. As a practical matter, however, aliens who receive voluntary departure should not expect their motions to reopen to be heard before they depart; they should expect to have to renew their attempts at immigration relief from abroad. We fully recognize that such relief will necessarily exclude reopening, because INS rules do not permit an alien subjected to removal proceedings to move to reopen them after leaving the country. *See* 8 C.F.R. § 1003.23(b)(1). But this rule does nothing to prevent the alien from pursuing the *ultimate* relief he or she seeks, *i.e.*, the right to remain in the United States legally, through other avenues after complying with a voluntary departure order. Indeed, that is one of the main attractions of voluntary departure from the alien's perspective: it comes without the waiting periods for seeking readmission attendant to an order of removal. *See Barroso*, 412 F.3d at 265 & n. 1. The unavailability of reopening from abroad, then, does not counsel in favor of tolling the departure period based on the filing of a motion to reopen; in fact, it reinforces our conclusion that doing so would disrupt the carefully calibrated bargain reflected in the voluntary departure provisions of IIRAIRA.

But IIRAIRA reined in this practice by allowing only 120 or 60 days to depart voluntarily, 8 U.S.C. §§ 1229(a)(2)(A), (b)(2), prohibiting courts from issuing any "stay of an alien's removal pending consideration of any claim with respect to voluntary departure," *id.* § 1229c(f), and imposing strict and mandatory sanctions on aliens who fail to depart on time, *id.* § 1229c(d)(1). These provisions reflect a coherent effort to ensure that voluntary departure does, in fact, result in the alien's expeditious departure from the United States. Reading § 1229a(7)(C)(1) as stopping the voluntary departure clock would contravene this purpose, allowing the filing of motions to reopen to delay voluntary departure dates. We cannot read the INA, as amended by IIRAIRA, as achieving this self-defeating result. *See Banda-Ortiz*, 445 F.3d at 391.

The conclusion we reach has been criticized as overemphasizing IIRAIRA's voluntary departure provisions at the expense of those "expressly codifying the tradition of motions to reopen...." *Azarte*, 394 F.3d at 1289; *see also Banda-Ortiz*, 445 F.3d at 391 (Smith, J., dissenting). Chedad makes a similar complaint in arguing that the voluntary departure provision does not undermine his "statutory right" to file a motion to reopen. A statutory right, however, is only as broad as the statute in question has made it. As set forth above, we do not believe that IIRAIRA made the right to seek reopening broad enough to supersede the sixty-day limitation on voluntary departure imposed by a different provision of the same act.

Chedad also urges us to disregard the BIA's 1996 decision in *Shaar*, on which both the IJ and the BIA relied in rejecting his tolling argument. We have recognized that "*Shaar's* continuing vitality is questionable," *Naeem v. Gonzales*, 469 F.3d 33, 38 (1st Cir. 2006), but here, that likely infirmity is beside the point. Our decision does not in any way turn on *Shaar* but on IIRIA itself. *Cf. id.* The

relevant provisions of the act simply do not contemplate suspending the voluntary departure period so that aliens who have chosen that form of relief also can pursue reopening. *See Banda-Ortiz*, 445 F.3d at 391. That this might lead aliens in removal proceedings to eschew voluntary departure so as not to jeopardize their opportunity to reopen, and thus deprive the government of the benefits of voluntary departure in a number of cases, cannot support judicially rewriting the statute. If Congress thinks it has gone too far, it can make the necessary revisions to the INA.

III.

Chedad also argues that, by granting his motion to reopen, the BIA vacated its prior decision affirming the IJ's voluntary departure order such that his failure to comply with it could not have triggered the penalties imposed by § 1229c(d)(1). The government responds that this argument is foreclosed by our decision in *DaCosta*. We agree.

In *DaCosta*, as here, the BIA entered a voluntary departure order against the alien, but, *after the departure deadline had passed*, granted her motion to reopen the removal proceedings to consider her application for adjustment of status. 449 F.3d at 47. On remand, the INS argued that the alien was barred from seeking adjustment of status by operation of § 1229(c)(d)(1), because she had not complied with the prior voluntary departure order. *Id.* at 48. The IJ disagreed, ruling that "the BIA's order reopening the case extinguished the legal consequences of [the alien's] failure to depart," but the BIA overturned that ruling on appeal. *Id.* We upheld the BIA's decision, reasoning that while "the BIA's reopening of the case had the legal effect of vacating the [voluntary departure] order, it could not 'retroactively nullify' DaCosta's previous violation of the

terms of that order." [9] *Id.* at 50-51 (quoting *Khalil v. Ashcroft*, 370 F.3d 176, 180 (1st Cir. 2004)).

The same is true here. The BIA's order of October 25, 2002, rejecting Chedad's appeal from the IJ's denial of his request for a continuance and denying his motion for remand, required Chedad to leave the United States within thirty days or to suffer the consequences enumerated in § 1229(c)(d)(1). Chedad did not do so. Instead, on November 22, 2002, he filed a motion to reopen, which the BIA ultimately granted on February 23, 2003. At that point, Chedad had overstayed his voluntary departure time by nearly three months. Section 1229c(d)(1) provides, unequivocally, that "[i]f an alien is permitted to depart voluntarily under this section and fails voluntarily to depart the United States within the time specified, the alien shall ... be ineligible for a period of 10 years for any further relief under ... section [ ] ... 1255 ... of this title." Chedad was permitted to depart voluntarily, but failed to do so within the time specified. He is therefore barred from seeking adjustment of status for ten years. This result follows automatically from Chedad's violation of the voluntary departure order and cannot be altered by the BIA's later decision to reopen the proceedings. *DaCosta*, 449 F.3d at 51.

As Chedad points out, he filed his motion to reopen *before* the expiration of the voluntary departure period, while DaCosta waited until *after* the departure deadline had passed

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[9] Amicus directs our attention to the Seventh Circuit's decision in *Orichitch v. Gonzales*, 421 F.3d 595 (7th Cir. 2005), which held that, by granting a motion to reopen filed after the deadline set by a prior voluntary departure order had lapsed, the BIA "dispos[ed] of the order that otherwise triggered the operative effect" of § 1229c(d)(1). *Id.* at 598. But this holding is at odds with our holding in *DaCosta*, which we are bound to apply. *See, e.g., United States v. Malouf*, 466 F.3d 21, 26 (1st Cir. 2006).

to file hers. In rejecting DaCosta's argument that the BIA nullified its voluntary departure order by reopening her case, we did note that the "voluntary departure period had already expired *before* she filed her motion to reopen with the BIA." 449 F.3d at 50. The outcome in *DaCosta*, however, turned on when the BIA granted the motion to reopen, not when the motion was filed, because the "order reopening DaCosta's case could not expunge her previous violation of an order to depart." *Id.* at 51. An alien cannot avoid the consequences of § 1229c(d)(1) by filing a motion to reopen before the departure deadline, allowing the deadline to pass without leaving the country, and receiving a favorable decision on the motion to reopen somewhere down the road. Such a result would be tantamount to tolling the departure period on the basis of a motion to reopen, so long as the motion is ultimately granted. As we have explained, we do not believe that IIRAIRA permits this outcome.

IV.

We recognize that the consequences of our decision are harsh: though Chedad's wife is an American citizen, he must leave the United States, and cannot seek adjustment of his own immigration status for another ten years. Moreover, this outcome presumably could have been avoided if Chedad's motion to remand the case on the basis of his wife's newly acquired citizenship, which he filed before the voluntary departure order became final, had been accompanied by his petition for adjustment of status as required by the regulations.[10] Nevertheless, neither the

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[10] Echoing this sentiment, the dissent suggests that Chedad's case illustrates the importance of treating a motion to reopen as tolling the voluntary departure period, because "with only one minor mistake, he will be required to leave the country and is precluded from seeking any relief for ten years." In fact, the ten-year bar on relief arises from a mistake of a different character-Chedad's failure to comply with the

BIA's decision to deny the motion based on this technical misstep, nor the quality of Chedad's counsel's performance, are before us. Chedad's petition presents only questions of statutory interpretation which we have resolved against him. The petition for review is therefore *denied.*

So ordered.

LIPEZ, Circuit Judge, dissenting:

Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009 (1996), containing both the voluntary departure provision, 8 U.S.C. § 1229c, and the motion to reopen provision, 8 U.S.C. § 1229a(c)(7), seemingly unaware of the conflict it was creating for those aliens who are granted voluntary departure *and* wish to exercise their statutory right to file a motion to reopen. I respectfully disagree with the majority's resolution of that conflict.

As the majority acknowledges, an alien who files a motion to reopen after being granted voluntary departure, but before she departs, will, absent extraordinary circumstances, be unable to obtain a decision from the BIA before she is required to depart. *See Dekoladenu v. Gonzales*, 459 F.3d 500, 504 (4th Cir. 2006) ("As a practical matter, the BIA will rarely reach a decision on a motion to reopen before the end of the voluntary departure period."); *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 393 n. 5 (5th Cir. 2006) (Smith, J., dissenting) (describing the backlog of cases before the BIA); 2006 EOIR Stat. Y.B. T2 (stating that in fiscal year 2006, the BIA received 9,256 motions to reopen, about 23% of the total number of appeals filed with the BIA in that year). Once she departs, the alien's motion to reopen is withdrawn,

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voluntary departure order despite his undisputed appreciation of the consequences.

and the limitation of one motion per alien prevents re-filing after departure. 8 C.F.R. § 1003.2(d). If, like Chedad, the alien does not depart by the expiration of the voluntary departure period, any relief will be denied due to her failure to depart, even if the motion to reopen is granted. 8 U.S.C. § 1229c(d) (stating that a failure to depart within the voluntary departure period will result in ineligibility "for a period of 10 years ... [for] any further relief," including, *inter alia*, cancellation of removal, adjustment of status, and change of nonimmigrant classification). Thus, it is effectively impossible for an alien who receives voluntary departure to obtain any relief through the motion to reopen process, despite the seemingly all-inclusive textual provision allowing such motions.

Although the majority acknowledges this conflict, it finds that Congress intended the voluntary departure provision to take precedence over the motion to reopen provision. Under the majority's interpretation, the statutory text allowing "an alien," without further restriction or limitation, to file a motion to reopen, 8 U.S.C. § 1229a(c)(7)(A), in effect applies only to those aliens who do not apply for and receive voluntary departure. I find unpersuasive the reason cited by the majority for its insistence that Congress intended this reading of the statute.

The majority asserts that Congress intended the limitations on the voluntary departure period to be strictly enforced, even at the expense of an alien's right to file a motion to reopen, because of the importance of voluntary departure to the "smooth functioning of the country's immigration procedures." Relatedly, the majority notes that IIRIRA made a number of changes to the previously existing voluntary departure rules, including limiting the length of the departure period and increasing the sanctions imposed on aliens who failed to comply with the terms of the departure agreement.

I agree with the majority's conclusion that these changes reinforce the point that voluntary departure is a particularly important component of our immigration system. However, in trying to resolve the statutory conflict raised here, we cannot look to IIRIRA's modifications to the voluntary departure scheme without giving equal attention to IIRIRA's adoption of the motion to reopen provision. *See Banda-Ortiz*, 445 F.3d at 392 (Smith, J., dissenting) (agreeing that "voluntary departure represents a bargain struck between an alien and the government," but objecting "to limiting our search for the terms of that bargain to statutory provisions conferring benefits on only one of the parties"). In other words, the best way to discern Congress' intent when it passed IIRIRA is to examine the statute as a whole, rather than focusing on a single piece. In my view, the panel majority gives short shrift to IIRIRA's simultaneous addition of a right to file a motion to reopen, and, therefore, fails to account for that component of the statute in its assessment of Congress' intent.

Instead of effectively writing an exception into the motion to reopen provision on such dubious grounds, I would follow the majority of circuit courts and hold that a motion to reopen, filed before the expiration of the voluntary departure period, automatically tolls the running of that period until the BIA resolves the motion. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) ("The BIA's interpretation ... deprives the motion to reopen provision of meaning by eliminating the availability of such motions to those granted voluntary departure. An approach more consistent with the statute as a whole is to toll the voluntary departure period when an alien, prior to the expiration of his voluntary departure period, files a timely motion to reopen.... Such an interpretation would effectuate both statutory provisions." (footnote omitted)); *see also Ugokwe v. U.S. Att'y Gen.*, 453 F.3d 1325, 1331 (11th Cir. 2006); *Kanivets v. Gonzales*, 424 F.3d 330, 335-36 (3d Cir. 2005);

Sidikhouya v. Gonzales, 407 F.3d 950, 952 (8th Cir. 2005). *But see Dekoladenu*, 459 F.3d at 505 (holding that the BIA is not required to toll the voluntary departure period when a timely motion to reopen is filed because of the statutory construction canon requiring that narrower provisions (here, the voluntary departure provision) take precedence over conflicting general provisions (here, the motion to reopen provision)); *Banda-Ortiz*, 445 F.3d at 390-91 (holding that the BIA is not required to toll the voluntary departure period because such tolling would be "in tension with, if not opposed to, limits on the length of and authority to extend voluntary departure," contrary to Congress' intent).

The two statutory provisions at issue here inescapably conflict, creating a certainty that the strict application of one provision will distort the other. Although the majority's approach enforces a literal reading of the voluntary departure provision, it does so by effectively rewriting the plain text of the motion to reopen provision. In the face of such a conflict, tolling offers a way of harmonizing the conflicting statutes instead of choosing between them.

> Tolling ... accords with all of Congress's objectives in IIRIRA. It preserves the right of all removable aliens to file a single, good-faith motion to reopen after a final adjudicative order of the BIA. It also allows aliens to seek voluntary departure without fear of surrendering other avenues of procedural relief. Finally, it does no damage to Congress's desire to place reasonable limits on the voluntary departure period: The total time initially allotted for departure (and hence the time available to file to reopen) still cannot exceed sixty days, and limiting claimants to one motion to reopen, supported by evidence of newly-discovered facts, will temper the frequency and duration of tolling.

Banda-Ortiz, 445 F.3d at 394 (Smith, J., dissenting).

We have previously stated that tolling the voluntary departure period is not legally equivalent to extending it. *Bocova v. Gonzales*, 412 F.3d 257, 269 (1st Cir. 2005) ("A suspension of a voluntary departure period merely tolls the running of that period; it does not extend it.") [11]; *see also Desta v. Ashcroft*, 365 F.3d 741, 747 (9th Cir. 2004) (defining a stay of voluntary departure as "stopping the clock from running," but noting that a stay does not "add[ ] more time to that clock"); *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 652 (7th Cir. 2004) ("Staying a voluntary departure order merely tolls the voluntary departure period; after the stay expires ..., the clock begins ticking again and the alien has the balance of the days left in which to leave the country ."). The distinction between a stay or tolling of a period and an extension of the period is widely recognized. *See, e.g., Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 473, 95 S. Ct. 1716, 44 L.Ed.2d 295 (1975) (Marshall, J., concurring in part and dissenting in part) (noting that the "common understanding" of tolling is that "tolling entails a suspension rather than an extension of a period of limitations"); *Sobers v. Shannon Optical Co.*, 326 Pa.Super. 170, 473 A.2d 1035, 1037 (Pa.Super.Ct.1984) ("[A] suspension of proceedings and a tolling of time limitations cannot be construed as the equivalent of an extension of time."). Applying that principle, the tolling approach here does not contravene the text of the voluntary departure provision. As Judge Smith,

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[11] In *Bocova v. Gonzales*, we held that an alien who has received voluntary departure and who seeks judicial review of the BIA's resolution of his case must file a motion seeking a stay of voluntary departure before the departure period expires and must explicitly request a stay. 412 F.3d 257, 268-69 (1st Cir. 2005). In that case we rejected the claim that we could reinstate a voluntary departure period that had expired while an appeal was pending with our court; our ability to stay the departure period is limited to cases in which a formal stay is requested before the period ends. *Id.*

dissenting from the Fifth Circuit's decision in *Banda-Ortiz*, observed, reliance on the doctrine of tolling does not "undermine" the statutory text simply because the effect may be to lengthen the number of calendar days before the alien is required to depart. 445 F.3d at 395 (Smith, J., dissenting).

We invoke the tolling remedy in our system of justice where the strict application of the time allotted for a particular action or filing leads to unfair or unjust results. *See Salois v. Dime Sav. Bank of N.Y.*, 128 F.3d 20, 25 (1st Cir. 1997) (observing that "under federal law, equitable tolling is applied to statutes of limitations 'to prevent unjust results or to maintain the integrity of a statute' " (quoting *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986))). I am not suggesting that the remedy of equitable tolling, in the classic sense, applies here. That remedy applies when the "extraordinary circumstances" of a particular case require relief from the time limits of a statute. Here, we are trying to avoid unfairness on a much larger scale from the unforeseen conflict of two statutory provisions. But that difference only strengthens the argument for the application of a tolling remedy derived from equitable principles that are designed to preserve the integrity of a statutory deadline while avoiding the harshness that can result from its unyielding application.

The majority asserts that the tolling approach, articulated most fully by the Ninth Circuit in *Azarte*, 394 F.3d 1278, is premised on the notion that "motions to reopen are available *only* in proceedings where voluntary departure has been granted." I find nothing in the text or reasoning of the other circuits' opinions suggesting reliance on such a dubious premise. The statute says that *all* aliens who have been unsuccessful in removal proceedings may file a single motion to reopen, without any reference to those who receive voluntary departure and those who do not. I agree with the majority that there is no conflict between this provision and

the voluntary departure provision as applied to those aliens who do not receive voluntary departure. In my view, however, this observation is simply a restatement of the problem and not a resolution of it.

The majority also responds to the tolling approach by saying that Chedad has no "statutory right" to file a motion to reopen because the statute does not provide such a right for those who receive voluntary departure. As the majority puts it: a "statutory right [ ] is only as broad as the statute in question has made it." However, under the plain text of the statute, Chedad, like every other alien who has been ordered removed, has a right to file a single motion to reopen, so long as he does so within sixty days of the final order of removal.[12] 8 U.S.C. § 1229a(c)(7)(A). The statement that Chedad has no "right" to file a motion to reopen derives not from the text of the statute, but from the majority's understanding of the legislative intent underlying that statute. Like the Ninth Circuit, I think "the proposition that Congress, while expressly codifying the tradition of motions to reopen, intended sub silentio to preclude their availability in a significant number of cases," *Azarte*, 394 F.3d at 1289, is implausible.

Although this case has all the indicia of a classic debate over statutory interpretation, it has substantial real world implications. In fiscal year 2006, immigration courts granted voluntary departure to over 22,000 aliens. 2006 EOIR Stat. Y.B. Q1. There is no dispute that tolling is unavailable for aliens who fail to file their motion to reopen

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[12] The statute, 8 U.S.C. § 1229a(c)(7)(C)(i), imposes a ninety-day deadline for filing motions to reopen. However, we have previously held that aliens who have received voluntary departure must file their motion to reopen prior to the expiration of the voluntary departure period, which is statutorily limited to sixty days. *See Naeem v. Gonzales*, 469 F.3d 33, 37-38 (1st Cir. 2006). Therefore, for aliens in Chedad's situation, the effective deadline for such motions is only sixty days.

prior to the expiration of the voluntary departure deadline. *See supra* note 3. Importantly, those aliens who have received voluntary departure already have been required to show good moral character for five years and the absence of any convictions for aggravated felonies or crimes of moral turpitude. *See* 8 C.F.R. § 1240.26(c)(1); *see also Banda-Ortiz*, 445 F.3d at 393 (Smith, J., dissenting) ("The result is particularly harsh when one considers that it operates to disadvantage those aliens whose good behavior has entitled them to the solicitude of the law of voluntary departure."). Even if only a small percentage of those aliens granted voluntary departure would file a timely motion to reopen, the majority's decision unwisely precludes any possibility of relief for aliens who might be entitled to such relief despite the exacting standards applicable to motions to reopen.

The specific facts of this case illustrate that harsh reality. Chedad has been in the United States for thirteen years, and has been in immigration proceedings for almost ten years, after he overstayed his six-month non-immigrant visa. At the time the proceedings began, he was married to a lawful permanent resident, who had a pending application for naturalized citizenship, and he has consistently asked the IJ and the BIA for a continuance so that his wife's application could be processed and, accordingly, his status could be adjusted to that of a lawful permanent resident. *See* 8 U.S.C. § 1151(b)(2)(A)(i). Although the IJ initially granted Chedad a continuance, the IJ refused to allow any further delays after a year. Chedad requested and received voluntary departure, and asked again for a continuance. The IJ denied his request and gave him sixty days to leave the country. Chedad promptly filed an appeal with the BIA. While his appeal was pending, his wife's citizenship was approved. With his appeal still before the BIA, Chedad filed a timely motion to remand, asking that his case be sent back to the IJ, before the BIA had decided the appeal, so that he

could adjust his status in light of his wife's American citizenship.

Chedad, however, made his one and only procedural error at that time. His motion to remand was not accompanied by a petition for adjustment of status, as the regulations required. On the basis of this technical oversight, the BIA denied the motion to remand and reinstated the IJ's voluntary departure order. Therefore, Chedad could only present evidence of his wife's change in citizenship status through a motion to reopen filed with the BIA. He filed that motion in a timely manner. The BIA, in fact, granted the motion to reopen, finding that he had made a prima facie showing of his eligibility for adjustment of status.[13] The BIA sent his case back to the IJ, who then denied all relief because Chedad had remained in the country after the expiration of the voluntary departure period. If the timely filing of Chedad's motion to reopen tolled the running of the sixty-day voluntary departure period, he could have presented his case for relief to the IJ.

Chedad has shown consistent cooperation and compliance with a maze of immigration laws and regulations. He has demonstrated his good moral character for a period of five years and has not been convicted of any aggravated felonies or crimes of moral turpitude. He is married to an American citizen and now, after nearly a decade of navigating our legal system, with only one minor mistake, he will be required to leave the country and is precluded from seeking any relief for ten years. That stark outcome may be repeated many times over by the failure to

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[13] In order to prevail on a motion to reopen, an alien must satisfy two requirements: she must "establish a 'prima facie case for the underlying substantive relief sought' and ... introduce 'previously unavailable, material evidence.'" *Fesseha v. Ashcroft*, 333 F.3d 13, 20 (1st Cir. 2003) (quoting *INS v. Abudu*, 485 U.S. 94, 104, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988)).

harmonize the conflicting statutory provisions at issue in this case in a sensible and fair manner.

I respectfully dissent.

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IN THE

Supreme Court of the United States

JAMAL MOORANI,

Petitioner,

v.

ALBERTO R. GONZALES, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY FOR PETITIONER

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INTRODUCTION

Aliens have a statutory right to both seek voluntary departure and to file one motion to reopen their immigration proceedings. Unless an order granting voluntary departure is tolled or voided, however, any pending motion to reopen is forfeited when a previously-established voluntary departure period expires. This case presents the issue whether a voluntary departure order is tolled or voided by a motion to reopen filed while the voluntary departure period is pending, but decided after it has expired. There is a clear circuit split on the issue. Four circuits (the Third, Eighth, Ninth, and Eleventh), which account for the majority of immigration cases in the United States, hold that the filing of a motion to reopen during a previously-established voluntary departure period tolls that period until the motion to reopen is resolved. Similarly, the Seventh Circuit has ruled that, where such a motion to reopen is *granted* by the Board of Immigration Appeals ("BIA"), the underlying departure order is rendered void—a standard under which Petitioner would have prevailed here. In contrast, the Fifth Circuit and the Fourth Circuit, which together account for a substantial percentage of immigration cases in the United States, take a no-tolling position and hold that such a motion to reopen is always forfeited when the voluntary departure period expires.

The Government, without contesting either the split that exists as to tolling or the importance of the issue presented, nonetheless argues that this Court's review is not warranted. It first contends that the split may become less robust because it speculates that it is "possibl[e]" that the Fifth Circuit's position may change if this Court vacates the now-moot decision in *Banda-Ortiz v. Alberto R. Gonzales, United States Attorney General*, 445 F.3d 387 (5th Cir. 2006), Opp. 18, where there is a pending certiorari petition.[1] The Government also maintains that non-judicial resolution of the issue presented may occur through new Justice Department regulations or new legislation. Opp. 19-20.

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[1] This Reply cross-references *Banda-Ortiz* Petition for Certiorari, filed Sept. 28, 2006 (hereinafter "*Banda-Ortiz* Pet."). Moorani's current counsel of record is the same as Banda-Ortiz's counsel.

The Government's position is unrealistic and suggests no serious basis for denying review. Even assuming that *Banda-Ortiz* will be vacated, there is no reasonable basis for believing that the law in the Fifth Circuit will change. The Fifth Circuit's position on the issue presented is clear—in *Banda-Ortiz*, a panel published its no-tolling opinion over Judge Smith's dissent; the court then received full briefing on Banda-Ortiz's petition for rehearing *en banc* and carefully considered it with five judges joining a dissent from denial of rehearing *en banc*. *Banda-Ortiz* Pet. App. 6a-7a. The prospect of a non-judicial resolution is even more far-fetched. There is no realistic possibility that the Justice Department will write regulations reversing a no tolling position the Department has consistently advocated to lower courts and repeats again in the Opposition here. As to a possible Congressional fix, the Government itself recently represented to the Court that immigration legislation is unlikely to pass in the near future. This Court should therefore immediately resolve the split presented in this case, which now involves seven circuits and the majority of immigration cases in the United States.

I. THERE IS A WELL-ESTABLISHED SPLIT ON THE ISSUE WHETHER A MOTION TO REOPEN THAT IS NOT RESOLVED DURING A VOLUNTARY DEPARTURE PERIOD IS FORFEITED

The courts of appeals have staked out conflicting positions on whether a pending motion to reopen is forfeited if it is not decided before a previously-established voluntary departure period expires. As set forth in the Petition (20-22), the Third, Eighth, Ninth, and Eleventh Circuits have taken a "no forfeiture" approach and hold that if a motion to reopen was timely filed (before the voluntary departure period expired), the voluntary departure period is tolled pending resolution of that motion. *See Kanivets v. Gonzales*, 424 F.3d 330, 336 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005); *Ugokwe v. United States Attorney General*, 453 F.3d 1325, 1331 (11th Cir. 2006).

The Fifth and Fourth Circuits have taken the opposite view and hold that an alien always forfeits a pending motion to reopen when the voluntary departure period expires. *See Banda-Ortiz* Pet. App. 8a; *Dekoladenu v. Gonzales*, 459 F.3d 500, 504 (4th Cir. 2006). The Government admits that there is a split between the Fifth and

the Fourth Circuits on the one hand, and the Third, Eighth, Ninth, and Eleventh Circuits on the other hand. Opp. 17-18.

The Seventh Circuit has held, in *Orichitch v. Gonzales*, 421 F.3d 595, 598 (7th Cir. 2005), that where the BIA *granted* a motion to reopen that had been filed before, but decided after, a previously-established voluntary departure period had expired, the grant of the motion to reopen necessarily vacated the underlying voluntary departure order. Moorani would prevail under this standard because the BIA initially granted his motion to reopen (although the Immigration Judge ("IJ") on remand held that his failure to depart during the voluntary departure period precluded adjusting his status). The Seventh Circuit did not reach the question of whether *filing* a motion to reopen voided the voluntary departure period since it ruled that *granting* the motion did so. There is also confusion and inconsistency in the lower courts on the effect of *granting* a motion to reopen.[2]

Accordingly, the conflict on this issue is well-developed and nothing would be gained from further percolation in the lower courts. The Government's efforts to avoid review would only unnecessarily prolong uncertainty and disuniformity on this issue throughout the country.

The Government nonetheless argues that the split may be somewhat reduced, although not eliminated, because it speculates that the Fifth Circuit's position may change in the future. Specifically, the Government unconvincingly suggests that if the Fifth Circuit's *Banda-Ortiz* decision were vacated as moot, as the Government recently requested in its Opposition, there is a "possibility that the Fifth Circuit ultimately could adopt a view

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[2] In *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002), the Ninth Circuit ruled that the "BIA's granting of a motion to reopen means that there is no longer a final" voluntary departure order "to review" for the court of appeals. In contrast, two circuits have held that a motion to reopen *filed and granted* after the voluntary departure period had expired does not void the underlying voluntary departure order. *See* Opp. 11 n.4; *see also Singh v. Gonzales*, 468 F.3d 135, 139-140 (2d Cir. 2006); *Dacosta v. Gonzales*, 449 F.3d 45, 50-51 (1st Cir. 2006). Although the Second Circuit expressly disagreed with the Seventh Circuit's *Orichitch* decision, *Singh*, 468 F.3d at 139, that case, and the First Circuit case, are technically distinguishable from *Orichitch* because the motion to reopen was filed *after* expiration of the voluntary departure period.

different" from that in *Banda-Ortiz* and, thus, this Court should not review the "unpublished opinion" issued in this case. Opp. 18. This reasoning is doubly flawed. First, even apart from the Fifth Circuit's decisions, there is still a clear split among the circuits on the issue presented. In *Dekoladenu*, the Fourth Circuit considered and explicitly rejected the approach of circuits allowing tolling. In any event, the Fifth Circuit's position is clear and there is no reasonable prospect that it could change. As a technical matter, *Banda-Ortiz* is the law of the Fifth Circuit and whether this Court will exercise its discretion to vacate that opinion in the future is not free from doubt. *See Banda-Ortiz* Reply 2. More to the point, as a practical matter, it could not be clearer that the rule set forth in *Banda-Ortiz* will continue to govern in that circuit. In *Banda-Ortiz*, the panel issued a published opinion over Judge Smith's vigorous dissent. *Banda-Ortiz* Pet. App. 8a-26a. Then, the court received full briefing on Banda-Ortiz's petition for rehearing *en banc*, and carefully examined it with five judges dissenting from the denial of rehearing *en banc*. *Id.* 6a-7a. Thus, this issue has been fully and finally ventilated in the Fifth Circuit. Indeed, the Fifth Circuit has already repeatedly confronted this issue and has not deviated from or questioned its holding in *Banda-Ortiz*.[3]

It needlessly delays matters for this Court to wait for the Fifth Circuit to "re-adopt" its fully considered position in another published case.[4] As of now, the vast majority of immigration cases are subject to the split, *see Banda-Ortiz* Pet. 13-14, and the issue presented here is not going to disappear. Indeed, the split is widening: In addition to the seven circuits to have considered the

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[3] *See, e.g.*, *Abbas v. Gonzales*, No. 06-60196, 2006 WL 3539165 (5th Cir. Dec. 7, 2006); *Moti v. Gonzales*, No. 05-61095, 2006 WL 3794345 (5th Cir. Dec. 19, 2006).

[4] The Government intimates that the Fourth Circuit's decision in *Dekoladenu* may be a better vehicle for this Court's review. Opp. 22 n.7. But given the Government's efforts to avoid the Court's consideration of this issue on other grounds, the substantial percentage of immigration cases that arise in the Fifth Circuit, and the immediacy and importance of the issue presented, this case is an excellent vehicle for this Court's review. It is also rank speculation whether *Dekoladenu* would be a suitable vehicle from a case-specific perspective, if certiorari were sought.

issue, there are others that will face it soon.[5] Further delay will only exacerbate the confusion throughout the country regarding the statutory rights of aliens.

II. THE ISSUE IS OF GREAT NATIONAL IMPORTANCE AND REQUIRES THIS COURT'S IMMEDIATE RESOLUTION

This Court has made clear that the immigration laws governing access into the country as a whole should be uniformly interpreted and administered. *Zadvydas v. Davis*, 533 U.S. 678, 700-01 (2001); *see also Banda-Ortiz* Pet. 11-12. This issue affects a significant number of aliens, all of whom should enjoy the same rights under the federal statutory scheme. This split is particularly troublesome because the Fifth and the Ninth Circuits have heavy immigration dockets and handle a large percentage of immigration cases in the country. *Banda-Ortiz* Pet. App. 7a. Moreover, the disagreement between those two circuits will lead, as Ninth Circuit Judge Carlos Bea has noted, to "forum shopping." *Hearing Before the United States Senate Judiciary Comm. on the Judicial Review of Immigration Matters*, 109th Cong. 7-9 (2006); *see also Banda-Ortiz* Pet. 14-17.

Nevertheless, the Government advises the Court that the issue may be resolved through the possible adoption of Department of Justice regulations or congressional legislation. Opp. 19-20. The Government's position on such non-judicial resolution is extremely unrealistic and, indeed, flatly contradicts its own prior representation to this Court.

First, there is no reasonable possibility that any future Justice Department regulations will alter the Department's oft-stated position on the tolling question presented here, and the Solicitor General does not suggest otherwise. In the lower courts and in the

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[5] *See, e.g., Martinez-Espino v. Gonzales*, Nos. 05-4076, 05-4453, 2006 WL 3690308, at *2 (6th Cir. Dec. 14, 2006) (noting that the Ninth Circuit's analysis in *Azarte* is "reasonable," but "leav[ing] to . . . a more appropriate case" to determine whether to "adopt *Azarte*"); *Naeem v. Gonzales*, 469 F.3d 33, 37 (1st Cir. 2006) (finding unnecessary, on the facts of the case, to decide the whether a motion to reopen tolls the voluntary departure period, but noting that "[e]ven the *granting* of a motion to reopen cannot expunge an alien's previous violation of an order to depart") (emphasis in original, internal quotation marks omitted).

Opposition here, the Justice Department has vigorously argued that the Act does *not* authorize tolling the voluntary departure period to resolve a motion to reopen because the "more specific voluntary departure provision governs." Opp. 14. There is no reason to believe, and the Solicitor General offers none, that the Justice Department, in writing regulations to generally govern aliens' voluntary departure, will alter the fully developed legal position it has consistently taken in litigation with respect to specific aliens. Thus, any Justice Department regulations in the near future plainly will not resolve the tolling issue that divides the lower courts.

Moreover, it is quite uncertain whether the Department will adopt any regulations, whatever their content, in the near future. The Government has not provided *any* deadline or timeframe for the adoption of the contemplated regulations. Such regulations have been pending for a decade. In 1997, the Department of Justice promulgated an "interim" rule that set forth three possible approaches to the issue presented. But there has been no further action taken or permanent regulations proposed in that time. *See Banda-Ortiz* Pet. 27-28. Given this history, it seems unlikely that a final rule will be adopted any time soon.

Second, the prospect of a legislative solution, which would, in any event, have only prospective effects (Opp. 23), is also remote. The Government recently represented to the Court in *Gonzales v. Duenas-Alvarez*, No. 05-1629, *cert. granted*, Sept. 26, 2006; *decided*, 127 S. Ct. 815 (2007), that immigration reform legislation is *unlikely* to be enacted in the near future and should *not* be viewed as a vehicle obstacle to a grant of certiorari. *Duenas-Alvarez* Pet. 22 ("[n]o conference committee has yet been appointed to reconcile the two bills, which differ in certain significant respects. . . . At this point . . . it is uncertain whether [the legislation will] pass"). Thus, even when the Republican party controlled the Presidency and Congress, the proposed immigration legislation was unlikely to pass. *See also Banda-Ortiz* Pet. 15-16. It now seems that, with Congress and the Presidency under the control of different parties and a Presidential election approaching, there is even less of a chance of comprehensive immigration reform. *See, e.g.*, Christina Bellantoni, *Senate GOP Ready To Fight For Agenda*, WASH. TIMES, Feb. 19, 2007, at A4 ("immigration reform" is at "the

bottom of the Republican agenda").

Moreover, the Government's representation in *Duenas-Alvarez* concerned legislation that had *passed both* Houses and awaited only conference committee reconciliation. Here, as the Solicitor General concedes, "comprehensive immigration reform bills *have not yet been introduced* in *either* the House or the Senate in this Congress," so the Government can only feebly offer that it is somehow "*anticipated* that such bills will be taken up by Congress during the current Session." Opp. 20 (emphases added). Effectively, the Government urges this Court not to resolve a clear, deep split affecting a substantial number of aliens because of its fanciful hope that legislation that has not been introduced might possibly be considered by Congress and might possibly resolve the issue here.

III. THE GOVERNMENT IS WRONG ON THE MERITS

The Government's defense of the forfeiture or "no-tolling" rule adopted by the Fourth and Fifth Circuits is unpersuasive.

It has long been established that it is a court's duty "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotations omitted); *Banda-Ortiz* Pet. 18-19. The relevant statutory language makes plain that aliens have the right *both* to seek voluntary departure *and* to seek reopening of their immigration proceedings. On the one hand, "[t]he Attorney General may permit an alien voluntarily to depart the United States" within a period up to "60 days." 8 U.S.C. §§ 1229c(a)(1); (b)(2).[6] On the other hand, "[a]n alien may file one motion to reopen proceedings" "within 90 days of the final administrative order of removal." 8 U.S.C. §§ 1229a(c)(7)(A); (c)(7)(C)(i). The BIA regulations state that if an alien leaves the country within the period allowed for voluntary departure, he forfeits any pending motion to reopen. *See* 8 C.F.R. § 1003.2(d).

The only plausible way to reconcile these provisions to preserve *both* statutory rights is to require tolling of any applicable

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[6] Failure to leave the country within the time allowed for voluntary departure renders an alien ineligible for ten years for cancellation of removal. *Id.* § 1229c(d); *see also* 8 C.F.R. § 1240.26(a).

voluntary departure period while an alien's motion to reopen proceedings is pending. A tolling rule "would effectuate both statutory provisions. IJs and the BIA could still grant voluntary-departure periods of up to 60 days only, but then, if that period were tolled, they would retain the authority Congress intended: to determine one non-frivolous motion to reopen." *Azarte*, 394 F.3d at 1288; *see also Banda-Ortiz* Pet. App. 19a. The contrary rule adopted below, in contrast, effectively nullifies the right to seek reopening. "[A]n alien who does *not* leave the United States within his voluntary departure period is not eligible for an adjustment of status, but an alien who *does* leave the country within his voluntary departure period forfeits any pending motion to reconsider or reopen which the BIA has not yet decided." *Barroso v. Gonzales*, 429 F.3d 1195, 1201 (9th Cir. 2005) (emphasis in original). As a result, "[e]ither way, stay or go," under the Government's position, aliens would be "precluded from obtaining a ruling on the merits of their properly filed, timely motion to reopen." *Azarte*, 394 F.3d at 1282; *Ugokwe*, 453 F.3d at 1331 (same).

Contrary to the Government's position (Opp. 15-16), tolling does not undermine the statutory "limits on the length" of a voluntary departure period because, unless explicitly provided otherwise, limitation periods are subject to tolling. "It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002) (internal citations and quotation marks omitted); *see also Banda-Ortiz* Pet. App. 22a (Smith, J., dissenting) (same). Thus, "suspension of a voluntary departure period merely tolls the running of that period; it does not extend it." *Barroso*, 429 F.3d at 1206 (internal quotation marks omitted); *see also Banda-Ortiz* Pet. 21-22.

Since there is no necessary conflict between these two provisions, the canon that a more specific provision controls a more general one when there is such "irreconcilable conflict," is inapplicable here. *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *see generally Banda-Ortiz* Pet. 22-26. The voluntary departure provision simply establishes a procedure for effectuating the alien's departure when that has been finally ordered. The

provision on motions to reopen before the BIA sets forth procedures for *continuing litigation* over an alien's immigration status, and has nothing to do with departure. Thus, these provisions address distinct subject matters and different stages of an alien's immigration proceedings. As discussed, these provisions can also be reconciled by allowing tolling. So it is only the BIA regulation precluding tolling, not the statute, which needlessly creates a "conflict." Therefore, the canons for reconciling conflicting statutory provision have no application.

In any event, the voluntary departure provision is not more "specific" than the motion to reopen provision simply because it affects a subset of aliens. Rather, as noted, the provisions simply do not govern the same conduct. The one narrow and discrete point of intersection addresses only the *effect* of an action under one provision (voluntary departure) on the action taken pursuant to a different provision (motion to reopen). Thus, these provisions are wholly unlike those in *Morton*, where both statutes governed precisely the same conduct—preferential race hiring by the government, but did so at different levels of generality.[7] *Morton*, 417 U.S. at 550-51. Here there is no such overlap.

Even if there were a conflict between the two provisions, the canon of statutory construction requiring that ambiguities in immigration statutes be resolved in favor of an alien calls for tolling. This Court has repeatedly endorsed this canon "because deportation is a drastic measure and at times the equivalent of . . . exile," and "we will not assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Tan v. Phelan*, 333 U.S. 6, 10 (1948) (internal citation omitted); *see also, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *Banda-Ortiz* Pet. 20-21. Here, the narrowest and most favorable reading of the statutory language is to permit aliens to meaningfully exercise their statutory rights both to seek voluntary departure *and* to seek reopening of their immigration proceedings. A contrary rule

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[7] Nor are the provisions analogous to those in other cases cited by the Fourth Circuit. *See Banda-Ortiz* Pet. 24-25 & n.3 (discussing cases). In each case, the more "specific" provisions plainly covered subject matter that was a subset of the subject matter covered by the more general provision.

would prevent "aliens from receiving decisions on their motions to reopen [and] would eliminate" in cases such as this "all possibility of redress if their circumstances changed." *Azarte*, 394 F.3d at 1289. This severely limits an alien's freedom and exercise of the statutorily-granted right to voluntary departure since the BIA will rarely act on a motion to reopen within the statutory maxium of 60 days for departure, 8 U.S.C. § 1229c(b)(2). *See* Pet. 23 (emphasizing that the proceedings on motions to reopen take months, and noting that it took the BIA five months to consider and grant Moorani's timely motion to reopen; that it took six months for the BIA to act on a motion in *Azarte* and eight months in *Kanivets*). The statute should therefore not be construed, under *Tan* and its progeny, to confront aliens with a Hobson's choice between sacrificing either their right to seek reopening or their right to seek voluntary departure.[8] The tolling interpretation which preserves both of the alien's rights is at least as plausible, and therefore must be adopted.

CONCLUSION

The petition should be granted.

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[8] Similarly, in *Stone v. INS*, 514 U.S. 386, 388-89 (1995) (Opp. 17), the Court noted that Congress would not want aliens to face a "Hobson's choice: petition for agency reconsideration at the risk of immediate deportation, or forgo reconsideration and petition for review to obtain the automatic stay."

In any event, the Government's reliance on *Stone* to reject tolling is erroneous because *Stone* is a finality, not a tolling, decision, where the Court's concern was with the implications of the finality of voluntary departure orders for judicial review. *Id.* at 390 ("The parties disagree . . . regarding the effect that petitioner's later filing of a timely motion to reconsider had on the *finality* of [voluntary departure] order.") (emphasis added); *id.* at 405 ("The consolidation provision in § 106(a)(6) reflects Congress' understanding that a deportation order is final and reviewable when issued."). The issue here is not whether the voluntary departure order is final, but rather whether tolling gives effect to all of the governing statutory provisions.

Respectfully submitted,

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